

(21,127.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 724.

LOS ANGELES FARMING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

v/s.

THE CITY OF LOS ANGELES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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L. A. No. 1952.

In the Supreme Court of the State of California.

THE CITY OF LOS ANGELES, Plaintiff and Respondent,

*vs.*LOS ANGELES FARMING & MILLING COMPANY (a Corporation),
Defendant and Appellant.

Appeal from the Superior Court of Los Angeles Co.

Hon. N. P. Conrey, Judge.

*Transcript on Appeal.*W. B. Mathews, H. T. Lee, J. R. Scott, Attorneys for Plaintiff
and Respondent.

R. M. Widney, Attorney for Defendant and Appellant.

Filed this 27 day of Aug., 1906.

FRANK C. JORDAN, Clerk,
By R. L. DUNLOP,
*Deputy Clerk.*5 In the Superior Court of the County of Los Angeles, State of
California.

THE CITY OF LOS ANGELES, Plaintiff,

*vs.*LOS ANGELES FARMING & MILLING COMPANY (a Corporation),
Defendant.*Complaint.*

The plaintiff, above named, complains of the above named defendant, and alleges:

I.

That this plaintiff is a municipal corporation, organized and existing under and by virtue of the constitutions and laws of the state of California, and located in the county of Los Angeles, in said state; and that the defendant, Los Angeles Farming & Milling Company, is a corporation, duly organized and existing under the laws of said state.

II.

That the Los Angeles river is an unnavigable natural stream of water, located wholly within the county of Los Angeles, state of California, and that said river takes its rise in the San Fernando valley, and in the mountains surrounding the same, in said county, and flows down for several miles from its sources until it reaches

the northern corporate boundary of this plaintiff, from which point said river flows down through the said city of Los Angeles, crossing its southern corporate boundary.

That the said river, throughout its whole length, including its branches as well as the main stream, consists of a surface stream and also of an underground stream; and that such underground stream extends throughout the whole of the lands of the defendant, herein-after described, from the top of the saturated or water plane down to bed-rock, and that all of the underground waters in said lands, from the surface of the ground down to bed-rock, are part of said river.

III.

That this plaintiff is now, and ever since its organization has been, the owner in fee simple of the paramount right to take and use all of the waters of said Los Angeles river, (as well its
7 branches as the main stream, and including the underground waters as well as the surface waters of said river), from its sources to the southern boundary of said city of Los Angeles, so far as might have been or may be reasonably necessary from time to time, to give an ample supply of water for the use of its inhabitants, and for all municipal and public uses and purposes of this plaintiff, (including, in such municipal and public uses and purposes, the extinguishment of fires, the sprinkling of streets and other public places, the irrigation of public parks and the creation and maintenance of artificial ponds and lakes therein, and the flushing of all internal and outfall sewers of said city, as well as all other municipal and public uses and purposes), for which this plaintiff and its inhabitants might have required or may require water, within the limits of said city of Los Angeles, as the same might have existed or may exist at the time of such taking and use.

IV.

That, subject to said paramount right of said plaintiff, to take and use the waters of said river, the said defendant is the owner of all that certain tract or parcel of land, situate in the county of Los Angeles, state of California, and bounded and described as follows, to-wit:

Beginning at the point of intersection of the center line of
8 the road known as the Los Angeles and Ventura road, with the westerly boundary line of the tract of land known as the property of the Lankershim Ranch, Land & Water Company, as shown and described on the plat thereof, recorded in book 31 of miscellaneous records, on pages 38-44 in the office of the county recorder of said county of Los Angeles; thence northwesterly and westerly along the center line of said road to its intersection with the easterly boundary line of a tract of land, known as the Rancho El Encino; thence northerly along said boundary line to the northeastern corner of said rancho; thence northeasterly in a straight line to a point in the westerly boundary line of the tract known as the property of the Lankershim Ranch, Land & Water Company; distant 22,260 feet northerly from the intersection of said line with the center line of the Los Angeles and Ventura road; said point being also the northwesterly corner of block 49 of said tract; thence

southerly along said westerly boundary line to the point of beginning, being part of the tract of land known and described as the south half of the Rancho Ex-Mission of San Fernando as shown and described on the plat thereof, recorded in book 31 of miscellaneous records, page 75 in the office of the county recorder of said county of Los Angeles.

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V.

That the defendant, above named, claims adversely to this plaintiff, an estate or interest in said real property, so owned by this plaintiff as aforesaid and also claims, adversely to this plaintiff, that it is entitled to divert from said river and use upon the above described lands and elsewhere, the waters of said river, both surface and subterranean, to the extent of the whole flow thereof, at the times that this plaintiff and its inhabitants may have need of said waters for the purposes for which this plaintiff and its inhabitants are entitled to use the same, as aforesaid.

VI.

That all of said claims of said defendant are without right and said defendant has not any estate, right, title or interest of, in or to the waters of said Los Angeles river, or any part thereof, or of in or to the use of the same, or any right to take or use said waters or any part thereof, save in subordination and subject to the said paramount right of this plaintiff to take and use all of said waters for the purposes for which it and its inhabitants are entitled to use said waters, as aforesaid.

Wherefore, this plaintiff prays judgment that said defendant may be required to set forth the nature of its claim to an estate or interest in said real property, so owned by this plaintiff, as

10 aforesaid, and that, by a decree of this court, it be adjudged that this plaintiff is the owner in fee simple of the paramount right to take and use all of the waters of said Los Angeles river, (as well its branches as the main stream, and including all of the underground waters in said land of said defendant, from the surface of the ground down to bed-rock), from its sources to the southern boundary of said city of Los Angeles, so far as may be reasonably necessary, from time to time, to give an ample supply of water for the use of its inhabitants, and for all municipal and public uses and purposes of this plaintiff, (including, in such municipal and public uses and purposes, the extinguishment of fires, the sprinkling of streets and other public places, the irrigation of public parks and the creation and maintenance of artificial ponds and lakes therein, and the flushing of all internal and outfall sewers of said city, as well as all other municipal and public uses and purposes), for which this plaintiff and its inhabitants may require water, within the limits of said city of Los Angeles, as such limits may exist at the time of such taking and use; and that said defendant has not any estate, right, title or interest, of in or to said waters, or any part thereof, or of, in or to the use of the same, or any right to take or use said

11 waters, or any part thereof, save in subordination and subject to the said paramount right of this plaintiff to take and use all of said waters for the purposes for which it and its

inhabitants are entitled to use said waters, as aforesaid; and that this plaintiff may have such other or further relief as may be proper in the premises.

W. B. MATHEWS,
LEE AND SCOTT,
HERBERT J. GOUDGE,
Attorneys for Plaintiff.

Duly served and filed March 13, 1906.

[Title of Court and Cause.]

Answer.

Now comes the said defendant and answering the complaint herein and for defense thereto:

I.

Denies that the said Los Angeles river flows down through said city of Los Angeles, or crosses its southern boundary.

II.

Denies each and every allegation contained in count or subdivision ~~marked~~ III in plaintiff's complaint.

III.

Denies each and every allegation contained in count or subdivision marked VI in plaintiff's complaint.

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IV.

Defendant further answering the demand of plaintiff that this defendant shall set forth the nature of its claim to an estate or interest in said real property claimed by said plaintiff in said complaint, alleges:

That this defendant and its predecessors in interest have been continuously, and this defendant now is the owner of in fee simple, and is in the exclusive possession of the premises hereinafter set out, and that this defendant and its predecessors in interest have been the owners thereof in fee simple, and in the actual possession thereof for over fifty years, last prior to the commencement of this action, paying all taxes thereon, claiming title thereto under conveyances and judgments therefor as hereinafter set out, that during all of said time, said lands, and the waters therein, or thereon, or riparian, or appurtenant thereto, have been used for the ordinary use of the said owners and occupants thereof.

Said premises are described as follows, to-wit: known as the lands of the Los Angeles Farming and Milling Co., and being the south half of the Rancho Ex Mission San Fernando, Los Angeles county, California, as shown by the map thereof, recorded in book 31, page 75, of miscellaneous records of Los Angeles county, California, in-

13 eluding the premises claimed by plaintiff herein, excepting from said south half the lands of the Lankershim Ranch, Land & Water Co., as shown by the map thereof, recorded in book 31, pages 38-44 of miscellaneous records of said county.

That the value of the premises in controversy is over \$500,000.00.

V.

Defendant further answering and setting out the nature of its said claim alleges:

That the title in fee to the lands and waters in controversy herein was originally from 1493 A. D. in the Crown of Spain until the time hereinafter mentioned.

That all of said title and rights of the Crown passed to the Republic of Mexico in 1822 A. D., upon the independence of said Republic as successors in interest of said Crown of Spain.

That said Republic of Mexico having the sovereign title to all of the premises duly granted on the 17th day of June, 1846, to the predecessors in interest of this defendant, pursuant to the laws of said republic, said Rancho Ex Mission de San Fernando, including said premises claimed herein by this defendant.

That by the treaty of peace with the Republic of Mexico of February 2, 1848, known as the treaty of Guadalupe Hidalgo, the sovereign rights and title of said republic of said premises passed to and were vested in the United States, by virtue of which 14 treaty the said United States obligated itself to respect and protect the rights of private property, including therein said grant to these defendants and their predecessors as aforesaid and their successors in interest.

That the United States by act of Congress, entitled an "Act" for the Admission of the State of California into the Union" approved Sept. 9, 1850, therein provided:

"That the said state of California is admitted into the Union upon the express condition that the people of said state through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned."

The said congress by an act entitled "An Act to provide for extending the Laws and the Judicial System of the United States to the State of California," approved Sept. 29, 1850, enacted, "That all the laws of the United States which are not locally inapplicable shall have the same force and effect within the state of California as elsewhere within the United States."

That by virtue of its sovereignty and the premises, the United States, by its congress by an act entitled, "An Act to ascertain and settle private land claims in the state of California, approved March 3, 1851, established a Board of Land Commissioners, "for the purpose of ascertaining and settling private land claims in the state of California," and further enacted therein, "That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the Land Commissioners, when sitting as a

board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claim." Said act further provided for the further proceedings, hearing, appeals and decisions thereon as set out in said act.

And it was further enacted therein, "That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all land, the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States and for all claims finally confirmed by said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly

16 certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same."

And it was further enacted therein, "That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the District Judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same." And it was further therein provided that said district judge should have jurisdiction to finally decide such adverse claims.

And it was further enacted therein "That the provision of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government or the lawful authorities thereof, but the claim for the same shall be presented by the corporate authorities

17 of said town, and the fact of the existence of the said city, town or village, on the said seventh day of July, eighteen hundred and forty-six, being duly proved shall be *prima facie* evidence of a grant to such corporation, and where any city, town or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of said city, town or village."

That it is further enacted therein, "That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the claimants only, and shall not affect the interest of third persons."

VI.

Defendant further answering and setting out the nature of their said claim allege:

That under and by virtue of the premises and laws aforesaid, that

said claim of said grant to the predecessors of this defendant were duly presented to said board of land commissioners and courts, and confirmed and a patent issued therefor by the United States the 8th day of January, 1873, as aforesaid, to the predecessors in interest of this defendant, and that by virtue of said grant and confirmation, and patent the grantees became vested with the title in fee simple to said premises therein described as well of all the waters
18 therein or thereon, or riparian thereto without limitation, exclusion or restriction as herein set out and claimed by this defendant, and that this defendant is the successor in interest of said grantees for the lands hereinbefore designated and of the waters thereon, therein or riparian thereto. That said grant is above said city on said river, some ten miles.

That while said board of land commissioners and said courts had jurisdiction of said claims and of any adverse claims of said city of Los Angeles thereto, or to the waters thereof as in sec. 13 of said act of March 3, 1851, provided, said plaintiff herein, nor its predecessors in interest did not contest the said claims or grants aforesaid in any manner, and did not present any petition to the said district judge of the United States for the district in which the lands are situated setting forth any title or claim to said grants or claims of said rancho for the title to, or use of said lands, or waters therein or thereon, or riparian thereto, or at all or in any manner.

Wherefore said defendant pleads said decrees and judgment of said courts and patent in favor of said grantees of said rancho and this defendant, as *res adjudicata*, and that said plaintiff herein is estopped and barred thereby from setting up or maintaining
19 any claim or interest in or to the premises in controversy herein or described in said patent.

VII.

Defendant further answering and setting out the nature of its said claim alleges:

That pursuant to the provisions of said act of congress of March 3, 1851, the mayor and council of Los Angeles city, which was a city existing at the date of said act, and as the corporate authorities of said city, did duly present to said board of land commissioners, the claims of said city, claiming a right or title derived from the Spanish or Mexican government for sixteen square leagues of land claimed or known as the pueblo of Los Angeles, and for the water rights of said Los Angeles river for the use of said pueblo. That such proceedings were duly had thereon, that the said claim was adjudged and confirmed to be valid to the extent of four square leagues, and as to the remainder of said claim, it was adjudged invalid and void, and was rejected, and said corporate authorities by their attorney thereto, duly stipulated and abandoned all other and further claim or rights to said grant other than said four leagues, and by said stipulation, said decree became final and conclusive between the United States and said claimant.

That said corporate authorities did not present any claim
20 to said board of land commissioners, of or for any grant or for the ownership in fee simple or otherwise of the paramount right to take or use all or any of the waters of said Los Angeles

river or its tributaries for any purpose whatever or at any time, except as above alleged. And that all such claims express or implied were rejected by the final decree of said board of land commissioners and courts aforesaid, and that by reason thereof, all of said claim or right of said city to said water, in said land of defendant, by the provision of Sec. 13 of said Act of Congress of March 3, 1851, were deemed and held and considered a part of the public domain of the United States, and the matter became conclusive between the United States and said claimants.

By reason of which premises, these defendants plead said decrees and judgment of said court against said corporate authorities as *res adjudicata* and that said plaintiff herein is estopped and barred thereby from setting up or maintaining any claim or title or ownership or interest in or to the premises in controversy herein.

That pursuant to said decree and the provisions of said act a patent was issued to the plaintiff herein as the corporate authorities of said city on the 9th day of August, 1866, for said four square leagues of land and not for or including any other or greater premises or any ownership in fee or paramount in or to any waters

21 of the said Los Angeles river, or its tributaries, nor in said land of defendant, which patent is conclusive against the said plaintiff herein. Said patent recites said decree and said rejection of all of plaintiff's claims, as aforesaid. And that by reason thereof, plaintiff herein is estopped from claiming or asserting any other or greater estate, right, title or interest than is in said patent aforesaid to said plaintiff set out. That on the 4th day of August, 1875, the officers of the United States land department, issued another and second patent, for the same premises to plaintiff herein. Defendant alleges the same to be null and void for want of jurisdiction in said officers to issue the same.

Defendant further answering and setting out the nature of its claim alleges:

That the plaintiff herein had not, nor owns any lands within the limits of its said patent riparian to said Los Angeles river or any of its tributaries, that said plaintiff has sold and conveyed the same and all thereof in fee simple and all of its claims and rights thereto, to various private parties in small subdivisions or lots for residence and other private uses and that none of the said lots or subdivisions are used for agricultural purposes and that said plaintiff has no riparian rights thereto.

Defendant further answering and setting out the nature of its said claim alleges:

That the alleged or claimed tributaries and sources of said 22 Los Angeles river are located on and have their principal source of supply on the public lands of the United States, and that the title and fee simple thereof is vested in the United States and not in the plaintiff herein, that said waters flow upon and to said lands of defendant from time immemorial.

That the legislature of the state of California by various acts thereof to-wit: An act supplementary to an Act entitled "An Act to incorporate the city of Los Angeles, passed April fourth, one thousand eight hundred and fifty.

Passed April 5th, 1851."

THE CITY OF LOS ANGELES.

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Also an Act entitled "An Act to amend the charter of the city of Los Angeles, to define its limits and rights, to enlarge its powers, and provide for its more efficient government."

Approved March 28, 1874.

Also the Act amendatory thereof to-wit:

Approved April 1, 1876,

Approved March 30, 1878,

Approved January 31, 1889,

attempted and purported to grant and convey to the plaintiff herein the right to own in fee simple the paramount right to take and use all of the waters of said Los Angeles river as well its branches and tributaries as the main stream from its sources, to the southern boundary of said city, for the uses and purposes claimed in plaintiff's complaint herein, as well as all of the waters of said

23 Ranchos Ex-Mission de San Fernando and of the lands of this defendant and of the public lands of the United States aforesaid.

That all of said acts of said legislature are null and void under said act of Congress aforesaid admitting the state of California into the Union, and are also void under the constitution of the United States prohibiting private property from being taken for public use, except by due process of law and upon just compensation therefor.

Defendant further answering and setting out the nature of its claim alleges:

That by reason of the premises aforesaid this defendant claims and owns all the waters in or on, or riparian to *their* said lands and the use of said waters for domestic and other purposes on said lands, to the extent thereof vested in this defendant by the patents decrees and Acts of Congress aforesaid, by reason of said waters being a part and parcel of said lands and having been vested in this defendant by said patents, decrees and Acts of Congress.

VIII.

Defendant further answering and setting out the nature of *their* claim alleges:

That by reason of the facts herein alleged that the right of plaintiff's action herein is barred by Sec. 315-316-318 and 319 of the Code of Civil Procedure of this state.

Wherefore these defendants having fully answered said
24 complaint, pray that said plaintiff take nothing by its action herein, and that these defendants be adjudged to be the owners of said lands including therein the waters thereon, therein or riparian thereto and of the right to use the same on said lands as herein fully set out, and for its costs, and for such other and further relief in the premises as may be just.

R. M. WIDNEY,
Attorney for Defendant.

Duly served and filed March 13, 1906.

[Title of Court and Cause.]

Stipulation of Facts.

It is hereby stipulated, between the said plaintiff and the defendant, Los Angeles Farming and Milling Company, defendant herein, that on the trial of the above entitled action, the following facts shall be deemed to have been proved, to wit:

I.

In the year 1781, the pueblo of Nuestra Senora Reina de Los Angeles, was established on the present Los Angeles river (then known as the Poreiumcula), by the governmental action of the authorities of the Kingdom of Spain, which ~~pueblo~~, embracing four square leagues, was included in and is part of the present city of Los Angeles, the center thereof being the center of the plaza, 25 and such four square leagues embracing the lands afterwards patented to the mayor and common council of the city of Los Angeles, as hereinafter stated.

In the same year of 1781, about twelve settlers and their families were placed by the Spanish government authorities in possession of building lots and farming lands, and water was at once taken out from said river in the pueblo limits, by means of ditches, and used for domestic purposes, and the irrigation of the lands of settlers.

The pueblo increased in population from time to time, and additional farming lands were put under irrigation, and sufficient water therefor was diverted within the pueblo limits from said river, until, at the time of the acquisition of the present state of California by the United States, the amount of such irrigable land was about 1500 acres, and during all of that time the irrigable lands *has* been irrigated from said river to the extent of their needs.

III.

Under the laws of the Kingdom of Spain, said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the complaint herein, to use all the water of the river, and such paramount right continued to 26 exist under that government and under the Mexican government, until the acquisition of California by the United States.

III $\frac{1}{2}$.

Neither the plaintiff herein, nor any of the municipal corporations of which the plaintiff is the successor, or any one else, ever presented for confirmation, (nor was there ever confirmed) the said grant or said claim of said municipal corporation under any of its corporate names, for the real property described in the complaint in this action and therein alleged to belong to said plaintiff, to the board of land commissioners or tribunals provided for in said act of Congress of March 3rd, 1851, entitled, "An Act to ascertain and settle the private land claims in the state of California," and the

acts supplementary thereof, except in so far as the same may have been embraced in the claim of the mayor and common council of the city of Los Angeles, presented and confirmed under said Act of Congress, as hereinafter set out, and resulting in the said patent to the said city as hereinafter set out, provided that nothing herein contained shall be construed as depriving said plaintiff of the benefit (if any) that it, or its predecessors, may have obtained by reason of the confirmation and the issuance of the patents for the other Spanish and Mexican grants, hereinafter referred to: but none of
 27 said ranchos or patents, except those for said Ex-Mission of San Ferando rancho, include any of the lands of the defendants, described in the complaint herein, and under none of said patents (except those issued to said mayor and common council, as aforesaid) is plaintiff a patentee or a grantee, under the Spanish or Mexican governments.

IV.

On the 4th day of April, 1850, an act of the legislature of the so-called state of California was passed, in words and figures as follows:

"An Act to Incorporate the City of Los Angeles.

The people of the state of California, represented in senate and assembly, do enact as follows:

SECTION 1. All that tract of land included within the limits of the pueblo de Los Angeles, as heretofore known and acknowledged, shall henceforth be known as the city of Los Angeles, and the said city is hereby declared to be incorporated according to the provisions of the act entitled "An Act to provide for the incorporation of cities," approved March 18th, 1850. Provided, however, that if such limits include more than four square miles, the council shall, within three months after they are elected and qualified, fix by ordinance the limits of the city, not to include more than said quantity of land, and the boundaries so determined shall thenceforth be the boundaries of the city.

28 SECTION 2. The number of councilmen shall be seven; the first election of city officers shall be held of the second Monday of May next.

SECTION 3. The corporation created by this Act, shall succeed to all rights, claims, and powers of the Pueblo de Los Angeles in regard to property, and shall be subject to all the liabilities incurred, and obligations created, by the Ayuntamiento of said pueblo."

Afterwards the name of said city was changed to the mayor and common council of the city of Los Angeles.

V.

On October 26th, 1852, the said mayor and common council of the city of Los Angeles filed their petition with the board of land commissioners, under the Act of Congress of March 3rd, 1851, entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," in words and figures as follows:

"Land Commission. Case No. 422.

City of Los Angeles, Pueblo Lands.

"To the Hon. Board of Commissioners for ascertaining and settling
Private Land Claims in California:

29 "The petition of the mayor and common council of the city of
Los Angeles respectfully shows, that they claim in fee a tract
of land situated in the county of Los Angeles known as the
pueblo lands, containing sixteen square leagues.

"They represent to your Hon. Board, that in the year of 1781,
Governor 'Phelipe de Neve' Commandant of the Internal Provinces
of the West, gave formal directions (herewith submitted marked
(A) with a translation marked (B) for the foundation of the
'Pueblo' de la Nuestra Senora de la Reina de Los Angeles,' and that
in 1786 Governor Fages instituted a commission which on the 4th
day of September of that year gave formal possession of their building
and farming lots to the settlers of said pueblo.

"Your petitioners further show to your Hon. Board that since that
date the said pueblo has continued to the present day; that in the
year 1835 by an Act of the Federal Mexican Congress, it was raised
to the rank of a city and made the capital of this territory of the
Californias.

"That on the 4th day of April, 1850, by an Act of the legislature
of California, it was declared incorporated according to the provi-
sions of an Act entitled an Act to provide for the incorporation of
cities, approved March 18th, 1850, and further that it should suc-
ceed to all rights, claims and powers of the Pueblo de Los Angeles
in regard to property.

30 "Your petitioners further show to your Hon. Board, that they
claim the sixteen square leagues in virtue of the general
laws of Spain and particularly of an ordinance of His Majesty
the King of Spain, wherein he provides for the establishment
of the town of Pitie in Sonora, and orders that the provisions relative
thereto should be followed in the foundation of any new pueblos
in the jurisdiction of the commanding general of the internal prov-
inces of the west, of which California constituted a part; a certified
copy of said ordinance from the officer of the surveyor general is
herewith submitted marked 'C' and a translation marked 'D.'

"Your petitioners further show to your Hon. Board that they
claim the boundaries and limits of said sixteen square leagues to be
as follows: taking the Plaza of the city as a center and running four
lines due north, south, east and west, to points two leagues distant
therefrom and then intersecting said points by lines drawn through
them at right angles and connecting so as to form a square of four
leagues each way except on the side of the mission of San Gabriel
whose lands it is supposed may prevent the proper extension from
being taken in that direction, so that the corresponding complement
of the area is claimed to be taken on the southern side by extending
the line thereof.

"They further state that for more than sixty years they have had
 31 peaceable and quiet possession of this tract and that said pos-
 session was known to and recognized by the Spanish and
 Mexican governments, and that all the lands in the neighbor-
 hood are subject to their claim, and have always been so granted and
 held.

"They further shew to your Hon. Board, that no record of any
 judicial possession can be found, but at various times, different lines
 have been marked out by competent Spanish and Mexican authority,
 and that in 1841 a commission was appointed to run lines as above
 described, by competent authority; but that after running one or
 two lines, it suspended its operations from unavoidable causes; and
 that in May, 1846, again a commission was named to run the lines
 of the said pueblo lands in conformity with a decree of Governor
 Pico hereunto annexed, marked 'E' and a translation thereof marked
 'F'; and which after running three of said lines also was interrupted
 by the breaking out of war in the then department of California.

"Your petitioners further shew to your Hon. Board that the said
 lands were granted to the pueblo as its common lands, in pur-
 suance of the policy and object of the Spanish government to en-
 courage in California the increase of cattle and horses. That as the
 fruits of that policy, the settlers of the pueblo became and now are
 32 large stock owners and necessarily needed and still need the
 common lands which were granted them for the pasture of
 their herds.

"They further shew, that about five square leagues of said tract
 of land are covered by the houses, gardens and farming lots of the
 city, and that the remaining quantity of land claimed is barely suf-
 ficient to afford pasturage to their horses and cattle owing to its
 sterility and the absence of water, and that there are no conflicting
 claims to the same either in virtue of title or of possession.

"They herewith submit the aforesaid documents, and rely on the
 same, and upon such other and further documentary and oral tes-
 timony as they may advise is necessary.

Wherefore, they pray the Honorable Board to take their claim into
 consideration, and to decree it to be good and valid and to confirm
 it.

By Their Attorney,

J. LANCASTER BRENT."

VI.

Annexed to said petition for confirmation were copies of two
 documents, referred to therein as Ex. A, B, C, D, one being in-
 structions of Philipe de Neve, governor of the Internal Provinces of
 the West, including California, of date May 26th, 1781, for the
 founding of said pueblo, and the other being a copy of the plan of

Pitie; of both of which judicial notice may be taken by this
 33 court, or by other courts in which this action may be pending.

So much of said documents, as is considered material, is
 contained in the following abstracts thereof but if either party desires
 to show more to the court, he may file typewritten copies thereof in
 the trial court, or may furnish a printed copy of such additional por-
 tions in the printed brief on appeal or writ of error.

VII.

Abstracts of material parts of instructions of Governor de Neve for founding pueblo of Los Angeles, referred to in said petition as exhibits A and B, are as follows, to wit:

"For the founding of the pueblo of La Reina de Los Angeles in the neighborhood of the river of Porciuncula and upon the land selected for its purpose, all the lands should be ascertained which can have the benefit of irrigation, marking out the most suitable place for constructing the 'Saca de agua' (water dam) in such manner that the greater portion of the lands may be subdivided. When the selection of the site is completed upon which the pueblo is to be located; upon land that may be slightly elevated and that may be freely open to the north and south winds guarding against the risks of sudden overflows and selecting the most suitable location to the neighborhood of the river or the mother ditch, if the first be
 34 not suitable arranging it so that the whole or greater part of the lands for cultivation of the pueblo shall be opened."

Gives instructions with regard to laying out plaza and streets:

"All the lands proper for the location of the pueblo shall be marked out in such a manner that the neighborhood and population increasing they may be able to build, and to this effect as many house lots ('Solares') shall be measured as there are farm lots ('Suertes') to obtain the benefit of irrigation; leaving besides upon the tracts that may be lands for cultivation a circuit of two hundred varas of land between them and the pueblo."

Provides for size of house lots.

"Each 'Suerte' (farm lot) as well irrigable as dry land shall be two hundred varas in length by two hundred varas in width; this being the land that commonly requires a fanega of corn in planting; the partition of said 'Suertes' as well as the 'Solares' must be in the name of the King our Master; to the new settlers; it shall be made equally and in proportion by the government to the new settlers, so that it may precede the corresponding measurement of the land that has the benefit of irrigation, reserving vacant the fourth part of the number that may result, counting with that of the settlers if they should remain, they shall be divided by two suertes to each one of the irrigable land, and two others of dry land; and from the
 35 rest shall be selected those suitable for (Propios) property of the pueblo; and from the Royal lands (Real engos) grants shall be made to those who newly enter to settle, which equal rule must be observed with these 'Solares' (house lots): marking out the land suitable for a church, public house, prison, and granary."

Gives instructions for the erection of church, and public buildings, and also with regard to the manner of distributing house lots ("Solares") and farming lands ("Sureties").

Dated at the Mission of San Gabriel, May 26th, 1781, and signed by Phelipe de Veve.

VIII.

Abstract of material parts of plan of Pitic, referred to as exhibits C and D in said petition.

"Instructions, approved by H. M. framed for the establishment

of the new town of 'Pitie' in the province of Sonora, ordered to be adopted for the other new projected towns that may be established in the district under this captain general's command."

In article 3, in referring to the appointment of certain officers, it is stated that the person selected for the position should be one of considerable instruction and knowledge to make the distribution of houses, lots and water.

6th. After having marked out and separated the tract of
 36 four leagues as granted to the new town its pasturing lands, forests, waters, hunting, fishing, stone, fruit trees, and every other thing produced thereon shall be for the benefit of the Spaniards and Indians residing therein and its outskirts or hamlet of the 'Seris' as also the pastures of the lands and ground, after gathering the products of the harvests as provided by laws 1 *et seq.*, title 17, book 4 of the Code (Recopilacion).

7th. The neighbors and natives shall likewise enjoy the use of the woods, waters and other benefits from the Royal and vacant lands lying outside of the tract assigned to the new town jointly with the residents and natives of the immediate and adjoining towns; which favor and right shall continue until by His Majesty the same shall be granted or alienated; in which case regulations will be made according to the provisions for concessions in favor of new possessors or proprietors."

"13th. After making out the commons and common pasture field, the commissioner will from a prudent calculation of all the useful and producting land, which by means of the ditch may be irrigated; and the remainder which without this benefit he may consider proper for sowing purposes as arable, he will divide each of them into equal 'suertes' of four hundred varas in length by two hundred in width, which is what is commonly needed to plant one fanega of corn."

37 "14th. Having thus divided the most profitable 'suertes' close to the town which have the benefit of irrigation, there shall be assigned and marked out eight 'suertes' which will be set aside as town property (proposito)."

"15th. The application of these eight 'suertes' of irrigable land having been set aside in favor of the property of the new town; the remainder of the profitable lands that there may be in the district either irrigable or arable shall remain for the benefit of the settlers to whom they shall be distributed and granted as they proceed to establish themselves thereon."

"19th. The benefit of irrigation being the principal means of fertilizing the lands and the most conducive to the improvement of the new town, the commissioners shall take particular care in the distributing the waters, so that all the lands that may be irrigable may be benefited thereby especially in the seasons of spring and summer when it is more necessary for the sowed fields in raising the crops; for which purpose with the help of experts or intelligent persons, he will divide the lands into parts or hereditaments, assigning to each a conduit or ditch issuing from the principal source with the quantity of water that may be deemed sufficient for the

irrigation thereof in said seasons, and the remainder of the year as
needed; by which means each settler shall know the row and
38 ditch through which he must irrigate his claim, and that
he cannot and has no authority to take water from any other
source, nor in greater quantity than is allotted to his place, for which
purpose, and to prevent his getting more to the prejudice of the
heirs located after or below him, it will be convenient that the con-
duits or distributing canals be constructed on the principal or main
ditch with mortar and stone at the expense of the same settlers.

20th. In order that these may enjoy with equity and justice the
benefit of the waters in proportion to their need thereof for their
respective crops; the Ayuntamiento shall annually appoint an alcalde
or inspector of each row, who shall be charged with the duty of
distributing the waters on the claims within the partido or tract
that may be irrigated in proportion to the necessity they may have
of this benefit; marking out upon a list he shall of the hours of the
day or night in which each land owner must irrigate his sowed fields
and that by the neglect or indifference of the owners, there may be
no lack of irrigation for those who need it, nor lose their crops in
which besides private injury, would also result damage to the public
good in the lack of provisions and supplies, it will also be the duty
of the alcalde or agent of each row to have a laborer knowing the
hour of the day or night designated for irrigation of each
39 tract or sowed field, who in default of the owner will tak-
care to irrigate it; the commissioner or justice regulating
afterwards the just price of the labor which he shall immediately
cause to be paid by the owner of the land or claim irrigated."

"21st. The distribution and cleanliness of the main ditch, for its
preservation, will be at the expense of all the neighbors at such
periods of time that may be designated by the commissioner and the
Ayuntamiento; each resident attending thereto with his personal
labor or in default thereof by the sum which by a pro rata equitable
assessments may be designated that he must pay to satisfy the
laborers; and with regard to the repairs and cleanliness of the con-
duits and ditches for irrigating the partidos or tracts in which the
district is divided; it shall be at the cost of the proprietors or heirs
whose 'Suertes' and possessions will be irrigated by them, among
whom the expense shall be divided according to a pro rata of the
number of 'Suertes' that each possessed at the presidio or ayuntamiento in accord
with the commissioners and determine without prejudice to the
sowed fields how much cleaning and repairing shall be done."

IX.

Said commissioners delivered an opinion at the time of the rendi-
tion of their decree, in words and figures as follows:
40 "The Mayor and Common Council of the City of Los
Angeles *vs.* The United States. For sixteen square leagues
of land known as the Pueblo Lands of Los Angeles.

"By written stipulation filed in the case, it is admitted that the
city of Los Angeles was regularly incorporated and declared to be

the capital of California by a law passed by the Mexican Congress on the 23rd day of May, 1835. That said city was in existence on the 7th day of July, 1846. That it was incorporated by an Act of the legislature of California passed April 4th, 1850, and that under the name used in the petition, it succeeded to all the rights, claims and powers of the pueblo of Los Angeles.

"This admission entitles the present city authorities to a confirmation of such pueblo lands as were understood to belong to them under the Mexican jurisdiction, and the only question to determine is as to the extent and limits of said claim.

"Efforts were made at different times to obtain a regular official assignment of lands for the ejidos and propios of the pueblo, and the establishment of boundaries which should designate its limits, but the act was never perfected.

"Under an order made by Pedro Fages while governor in 1786 Jose Arguello assigned lots at the pueblo to him of the citizens residing there and made a map of the same. He also shows in his report an attempt at designating lands for the ejidos and propios of the pueblo. But his description is so indefinite as really to affix no boundaries and to designate no quantity of land to be assigned.

"It appears from the evidence that in 1836 a decree of the Departmental Assembly was enacted directing the measurement and assignment of these lands; but the commission which was appointed for the purpose did not complete the work.

"And in pursuance of a petition of the ayuntamiento of said pueblo setting forth the facts of the failure to obtain the assignment and the settlement of boundaries, a new order was issued by the governor directing the former order to be carried into effect. This was never done, and no assignment of lands was ever made to the pueblo."

"The petitioner claims that the law gave to the pueblo a right to sixteen square leagues of land where no specific boundaries or measurement was made to be taken in a square form, bounded by four lines two running north and south and two east and west, and each having its center at the distance of two leagues from the center of the plaza.

"The law contemplates the assignment of land to the pueblos adjoining them for public purposes but instead of being sixteen leagues in quantity, it was four square leagues and where no other designation was made by competent authority it embraces a square with its exterior lines running to the cardinal points two leagues in length with the respective centers at the distance of one league from the center of the plaza. A citation of the Spanish and Mexican authorities and the opinion of the board on this point will be found at length in the case of the city of San Francisco, No. 280, on the calendar of causes of the commission, and it will also appear from the decision of that case that this board derives its authority to confirm this claim particularly from the 14th section of the Act of Congress of the 3rd of March, 1851.

"Evidence is given tending to show the exercise of certain acts

of control indicating ownership over the lands by the city authorities, and their claim of right to it; but the proofs do not show the limit with sufficient certainty to determine that any acts were done outside the boundaries of the four square leagues above designated, no foundation is laid by the evidence for presuming the assignment to the city beyond the four square leagues given by law.

"A decree will be entered in the case confirming four square leagues with the boundaries indicated above."

43

X.

Afterwards, on February 5th, 1856, said board of land commissioners made its decree, in words and figures as follows:

**"THE MAYOR AND COMMON COUNCIL OF THE CITY OF LOS ANGELES
vs.
THE UNITED STATES.**

"In this case on hearing the proofs and allegations, it is adjudged by the commissioners that the claim of the said petitioners is valid for the land hereinafter particularly mentioned and described, and it is therefore decreed that the same be confirmed to them; and as to the remaining portion of the premises described and claimed by them in their petition to the commission; it is adjudged that their claim is invalid and their application for a confirmation thereof is therefore rejected.

"The land of which confirmation is hereby made is situated in Los Angeles county and contains four square leagues of land and is bounded on the north and south by two parallel lines each two leagues in length and running due east and west, and on the east and west by two parallel lines each two leagues in length and running due north and south; said boundary lines being so drawn that

their respective centers shall be in a direction due north,
44 south, east and west from the center of the plaza of said city
of Los Angeles, and each at the distance of one league from
the same.

**"ALPHEUS FELCH.
"R. AUGT. THOMPSON.
"S. B. FAREWELL."**

XL

Afterwards, on August 9th, 1866, a patent was issued by the United States of America to, and afterwards accepted by, the mayor and common council of the city of Los Angeles, the material portions of which are as follows:

"The United States of America to all to whom these presents shall come, Greeting:

"Whereas, it appears from a duly authenticated transcript, filed in the general land office of the United States, that, pursuant to the provisions of the Act of Congress, approved the third day of March,

one thousand eight hundred and fifty-one, entitled, 'An Act to ascertain and settle the private land claims in the state of California,' the mayor and common council of the city of Los Angeles, filed their petition, on the 26th day of October, 1852, with the commissioners to ascertain and settle the private land claims in the state of California, sitting as a board in the city of Los Angeles, in which petition they claimed the confirmation of their title to a tract of land, designated as the
 45 'City Lands of Los Angeles,' containing sixteen square leagues, situated in the county of Los Angeles and state aforesaid, said claim being founded on a Mexican grant to the petitioners made on the 25th day of August, 1844, by Manuel Micheltorens, then governor of the department of the Californias; and whereas, the board of land commissioners aforesaid, on the 5th day of February, 1856, rendered a decree of confirmation as follows: 'In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the said petitioners is valid, for the lands hereinafter particularly mentioned and described and it is therefore decreed that the same be confirmed to them, and as to the remaining portion of the premises described and claimed by them in their petition to the commission it is adjudged that their claim is invalid, and their application for confirmation is therefore rejected. The land of which confirmation is hereby made, is situated in Los Angeles county, and contains four square leagues of land,' and the said decree or decision having been carried by appeal to the District Court of the United States for the southern district of California, the following proceedings were had in the cause entitled,

**'THE MAYOR AND COMMON COUNCIL OF THE CITY OF LOS ANGELES,
 Appellants and Appellees,
 vs. and *ads.***

THE UNITED STATES, Appellees and Appellants.

Notice having been received from the attorney general of
 46 the United States that the appeal of the United States in this case will not be prosecuted, and the appeal of the claimants, from such part of the decision of the board of land commissioners as was adverse to their claim, having been abandoned, and a stipulation having been entered into between the United States district attorney, and the attorney that both of the said appeals may be dismissed.

"It is ordered that the appeal of both parties, in this case from the decision of the United States board of land commissioners, be and hereby are dismissed, and that the claimants may proceed under the said decision as under a final decree."

And whereas, under the 13th section of said Act of 3rd of March, 1851, there have been presented to the commissioner of the general land office a plat and certificate of the surveyor of the tract of land confirmed as aforesaid, authenticated on the 2nd day of July, A. D. 1859, by the signature of the surveyor general of the public lands of California, which plat and certificate are in the words and figures following, to-wit:

**UNITED STATES SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA.**

'Under and by virtue of the provisions of the 13th section of the Act of Congress of the 3rd of March, 1851, entitled "An Act to ascertain and settle private land claim in the state of California," and of the 12th section of the Act of Congress approved on the 47 31st day of August, 1852, entitled, "An Act making an appropriation for the civil and diplomatic expenses of the government for the year ending the thirtieth of June eighteen hundred and fifty-three, and for other purposes, and in consequence of a certificate of the United States District Court for the southern district of California, of which a copy is annexed, having been filed in this office, whereby it appears that the attorney general of the United States, having given notice that it was not the intention of the United States to prosecute the appeal from the decision of the United States board of land commissioners, appointed under the said Act of March 3rd, 1851, to ascertain and settle private land claims in the state of California, by which it recognized and confirmed the title and claim of the mayor and common council of the city of Los Angeles to the tract of land designated as the 'City Lands of Los Angeles,' the said appeal has been vacated and thereby the said decision in favor of the said mayor and common council has become final.

"The said tract has been surveyed in conformity to the grant thereof and the said decision and I do hereby certify the annexed map to be true and accurate plat of the said tract of land as appears by the field notes of the survey thereof made by Henry Hancock, 48 deputy surveyor, in the month of September, 1858, under the direction of this office, which having been examined and approved are now on file therein, and I do further certify that under and by virtue of the said confirmation and survey the said mayor and common council of the city of Los Angeles are entitled to a patent from the United States upon the presentation hereof to the general land office for the said tract of land, the same being bounded and described as follows, to-wit."

(Here follows description by field notes, and land designated on annexed map; such land embracing four square leagues, in square form, the center whereof is the center of the plaza of said pueblo, excepting a tract of between 500 and 600 acres in a triangular shape bounded north by the northern boundary of said four square leagues of said pueblo, on the east by the Arroyo Seco and on the west by the Los Angeles river, and being about 150 chains from east to west and about ninety chains from north to south; containing 17,172-37-100 acres of land.

The map shows the south boundary line crossing the bed of the Los Angeles river marked "Dry bed of Los Angeles River," and field notes state "to the west bank of the dry sandy bed of the river of Los Angeles," and shows that the Los Angeles river bed runs through said patented land, crossing the northern and southern boundaries.

40 Dated July 2, 1859, and signed by J. W. Mandeville,
 United States surveyor general, California.)

"Now know ye, that the United States of America, in consideration of the premises and pursuant to the provisions of the Act of Congress aforesaid of the 3rd of March, 1851, have given and granted, and by these presents do give and grant, unto the said mayor and common council of the city of Los Angeles, and to their successors in office, the tract of land embraced and described in the foregoing survey, but with the stipulation that, in virtue of the 15th section of said Act, the confirmation of this claim and this patent 'shall not affect the interest of third persons.'

"To have and to hold the said tract with the appurtenances unto the said mayor and common council of the city of Los Angeles forever, with the stipulation aforesaid.

"In testimony whereof, I, Andrew Johnson, president of the United States, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

"Given under my hand, at the city of Washington, this ninth day of August, in the year of our Lord, one thousand eight hundred and sixty-six, and of the Independence of the United States the ninety-first.

"By the President,

[SEAL.]

"ANDREW JOHNSON,

"By EDW. D. NEILL, *Secretary.*

"MARTIN BUELL,

*"Acting Recorder of the General Land
 Office, ad interim."*

"Recorded Vol. 6, pp. 144 to 150."

Afterwards, on the 4th day of August, 1875, another patent was issued by the United States of America to the mayor and common council of the city of Los Angeles, and their heirs, in substantially the same form and substance, and for the same premises, as the patent of August 9th, 1866, with the following exceptions:

1. No mention was made of the fact that the land, for which confirmation was asked, contained sixteen square leagues, nor that such claim was founded upon a Mexican grant to the petitioner made on the 25th day of August, 1844, by Manuel Micheltorena, then governor of the department of the Californias.

2. Said patent of August 4th, 1875, contained a certificate of the United States surveyor general for California that notice of the plat and survey had been advertised in two newspapers, in one from July 18th, to August 8th, 1873, and in the other from July 17th to August 7th, 1873, and also a certificate of said surveyor General that the plat has been published in two newspapers, in one from September 29th, to October 26th, 1860, in another from September 2-th to October 16th, 1860.

3. The plat of survey in the patent of 1875 contained a certificate of said surveyor general, dated June 19th, 1874, that the plat was a correct copy of the original, and also contained an endorsement that the plat had been approved August 4th, 1875, by the commissioners

of the general land office; the plat of survey being the same in both patents.

4. The patent was signed by the president, U. S. Grant, by B. B. Cone, secretary, and by L. K. Lippincott, recorder of the general land office, and was stated to be recorded in Vol. 9, pages 454 to 464.

Neither of said patents embraces any of the lands of the defendant, described in the complaint or answer herein.

XII.

That the Rancho Ex-Mission de San Fernando was an imperfect or inchoate grant made by the Mexican government June 14th, 1846, to the predecessor in interest of said defendant, Los Angeles Farming and Milling Company, and was duly presented to and confirmed by said board of land commissioners and tribunals as required by said Act of Congress of March 3, 1851, and a patent therefor

52 was duly issued, in the usual form, by the United States on January 8, 1873. Said patent for said rancho includes a tract of land of 121,619 acres through a part of which said Los Angeles river and its tributaries flow, so that said rancho appears from said patent to be (and is) riparian to said river, said patent states that the United States of America grants the land therein embraced with the appurtenances and without making any reservation or exception of any rights to said river or its sources or tributaries or of the waters thereof.

XIII.

That said patent embraces the land claimed and owned by said defendant, the Los Angeles Farming and Milling Company, herein described in the complaint herein and his said answer in this action.

Said rancho and patent being the same referred to in the case of Los Angeles Farming and Milling Company *vs.* Thompson, *et al.*, reported in 117 Cal. 594, and in Thompson *vs.* Los Angeles Farming and Milling Company, 180 U. S. 72 (45:432).

At the time of the commencement of this action, and trial thereof the defendant The Los Angeles Farming and Milling Company owned all of the right, title and interest that was ever owned by the patentee of said rancho under said United States patent therefor
53 so afar as it relates to the land owned by said defendant and described in the complaint and answer herein.

XIV.

That the value of the premises in controversy herein, is over \$400,000, and that said defendant and their predecessors in interest have paid all taxes or assessments levied on said lands, and have been in the actual and exclusive possession of said lands since the granting and patenting thereof, using the same for the ordinary purposes of husbandry, farming and pasturage, claiming to own the same under said grant, decree and patent.

XV.

Neither the plaintiff nor any of its predecessors ever contested said grants, surveys thereof or proceedings at any time or in any manner

under said Act of Congress, or any of the Acts supplementary thereof.

Said rancho is situated some ten miles above the city of Los Angeles on said river, and above any of the points of diversion of water by said city.

XVI.

After the acquisition of California by the United States the pueblo of Los Angeles continued to exist and to be managed by the pueblo authorities, who continued the use of the water of said river for domestic purposes and irrigation by its inhabitants as theretofore, the water being diverted within said four square leagues; and this continued until the incorporation of the city of Los Angeles in 1850, under the Act hereinbefore set out.

XVII.

After the incorporation of said city the use of the water of said river was continued in the same manner as before, substantially all of said surface water which reached the city limits being diverted within said four square leagues for the irrigation of the irrigable lands thereof, and for the domestic use of the inhabitants of the said city, and this has continued ever since until about 1901, since when all of said water was needed and used for domestic purposes in said city as enlarged from the patented area of 17,172 acres, to 27,695 acres, in 1898, and the use of the water for irrigation and the irrigating system of the city was abandoned and the water was thereafter used for domestic purposes.

XVIII.

In 1868 a ditch was constructed from a point on said river within the Providencia rancho and a mile or more below the lands of said defendant and the water to the extent of about four hundred inches measured under a four inch pressure, was carried through said ditch to said city, and used for the irrigation of lands embraced in said patent to said city, and the amount of such diversion was 55 gradually increased until it exceeded six hundred inches in 1893, and such diversion continued ever since, but since about 1901 such water has been used in said city for domestic and park purposes. Said ditch was constructed by a private corporation (The Canal and Reservoir Company) under a contract with said city of Los Angeles, and about 1876 the same was purchased by said city, and was thereafter controlled by the city authorities, being the same ditch litigated in the case of *Los Angeles vs. Baldwin*, 53 Cal. 469-475, hereby referred to.

XIX.

In the year 1868 the Los Angeles City Water Company, a private corporation, under contract with said city to supply it and its inhabitants with water for domestic purposes, constructed a ditch from a point on said river within the Los Feliz rancho about three miles below said defendant's lands, by means of which water to the extent of two hundred inches, measured under a four-inch pressure, was brought down to said city, and there used in the domestic water

works system of said company for domestic use of the inhabitants of said city, and this continued until 1901, when said water works system was taken over by said city, and has been used by it to supply itself and its inhabitants with water.

56 From the time that said last mentioned diversion began, the amount of such diversion was increased as to all of said supplies at the rate of about fifteen inches for every thousand inhabitants, and the population of said city increasing from 5000 in 1868 to 11,000 in 1880; 50,000 in 1890; 100,000 in 1900, and 200,000 in 1905.

XX.

The surface stream of said Los Angeles river crosses the northern corporate boundary of plaintiff, being the northern line of the four square leagues included in said patent to said city, but said surface stream does not reach the southern corporate boundary of said city in the dry season of the year, extending from June to November or December, except after an unusually heavy season of rainfall, but said stream would reach said southern corporate boundary if substantially all the waters were permitted to flow down past said northern corporate boundaries.

XXI.

Said surface stream continues for a distance of several miles above said city to points where the same rises from beneath the surface of the ground, except that during a portion of the year, in seasons of heavy rainfall said surface stream extends up to the mouth of the various canyons from which surface streams (coming from public

lands of the United States, and which are the sources and 57 tributaries of said Los Angeles river) emerge during the whole year, but which before summer, sink into the sand at or near the mouth of such canyons.

XXII.

All of the territory in which said surface stream of said river constantly flows, and all of the valleys through which the torrential surface stream of said river flows, in winter and spring, up to the mouths of said canyons, are embraced within Spanish and Mexican grants confirmed and patented to parties other than plaintiffs, under said Act of Congress of March 3, 1851, which, with the tributaries and sources of said river, are shown on map, exhibit A., hereto attached, and are included in the blue line thereon marked A-B-C-D, as are also the various aforesaid grants and public lands.

XXIII.

It is further stipulated that any court in which this action may be pending, shall take judicial notice of all statutes private, as well as public, of California, from the first session of 1850 to the present time, and including all charters and amendments to charters, approved under the constitution of 1879, both as originally adopted and as subsequently amended from time to time, so far as the same relate to or affect the plaintiff, or any municipal corporation of which

58 it is the successor, or the said Los Angeles river, or the waters thereof, as set forth in the published statutes of the state of California, the same as if fully set out herein. That the minimum flow of water in said Los Angeles river in dry seasons is about 3000 miners' inches, which minimum continues for only for about one month of each year; that the average maximum flow of said river is considerably greater.

XXIV.

That the plaintiff has sold all of the lands originally and now embraced in the said United States patent to the plaintiff, riparian to said Los Angeles river, and has not owned any such for over ten years last past, and has sold all of the original pueblo and patented lands to private parties, and the same are held in small lots for residence and business purposes, except that said city owns as a municipal corporation certain lots on which are the public city buildings, and also certain parks, none of which are under irrigation for agricultural purposes, but are watered and sprinkled for ornamental purposes. But the plaintiff owns the river bed 200 feet more or less, in width, inside of its United States patented lines.

XXV.

It is further stipulated that all of the allegations and statements set forth and contained in paragraphs I and II of the complaint of the plaintiff herein, are true.

59

XXVI.

It is further stipulated that either party may, at any time prior to the trial, file written objections to any of the facts herein stipulated to be true, with the same effect as if such objections had been made to the offer of evidence tending to prove those facts. And such objections shall be ruled on by the court, and the ruling thereon shall be deemed excepted to by the party against whom such ruling is made, and that, if such objections are sustained, either party may introduce further evidence to supply the defect.

XXVII.

It is further stipulated that, in consideration of the disclaimer by the plaintiff of any interest in the lands described in the amended cross-complaint herein, the case, made on the complaint and answer, shall be submitted and decided on the foregoing stipulation of facts without any further evidence on the part of either party, and such stipulation of facts is hereby made irrevocable.

W. B. MATHEWS,
LEE & SCOTT,
HERBERT J. GOUDGE,
Attorneys for Plaintiff.

Mar. 13th, 1906.

R. M. WIDNEY,
Atty for Deft.

Duly made and filed March 13, 1906.

60

[Title of Court and Cause.]

Defendant's Objections to Evidence.

The said defendants herein, the said Los Angeles Farming and Milling Co. (a corporation), each defendant for himself separately and on his own behalf, objects, to the introduction as evidence herein, to each and every fact separately stated in the stipulation of facts herein and to each stipulation of facts as a whole and separately, as numbered and designated as hereinafter set out, and as herein-after specifically objected to as follows, to-wit:

1st.

That stipulations of facts numbered and designated XVI, XVII, XVIII, XIX, and each separate fact therein stated are irrelevant, immaterial, inadmissible, and incompetent under the pleadings, or to vary in any manner the force or effect of the respective United States patents issued to the plaintiff herein, or to the predecessors in interest of said defendants, or to either or any of them and to that extent the admission thereof would be in violation of the Federal laws and constitution set out in def'ts' answer herein.

2nd.

That said evidence and any claim thereunder from the 61 Spanish or Mexican government was limited to the exclusive jurisdiction of the board of land commissioners, and tribunals provided for in the Act of Congress, entitled "An Act to ascertain and settle the private land claims in the state of California, of March 3rd, 1851, (U. S. Stat. L. V. 9, p. 631) and said claim and evidence not having been presented thereto is null and void and inadmissible as evidence herein. And its admission would be in violation of the said Federal laws and constitution.

3rd.

That the rights and claims of the plaintiff and this defendant by virtue of any right and claim derived from the Spanish or Mexican governments were adjudicated by said commissioners and tribunals as in said act provided, and the United States government issued its patents pursuant thereto to the plaintiff, August 9th, 1866, and to the predecessors of this defendant, August 6th, 1872, to each separately; and that the same are final and conclusive, and that said evidence is inadmissible to vary, modify, contradict or in any manner impeach or modify said decree or patents, and that its admission would be in violation of the said Federal laws and constitution.

4th.

That the claim of plaintiff herein, the city of Los Angeles, under 62 said evidence to the premises in controversy was never presented to said tribunals provided for in said Act, at any time and thereby said claim and said evidence became null and

void and barred, and said evidence is inadmissible to establish any right or title in plaintiff, herein claimed to be derived from the Spanish or Mexican governments to the premises in controversy. And its admission would be in violation of the said Federal laws and constitution.

5th.

That the claim of said city of Los Angeles, attempted to be established by said evidence herein, by reason of its non-presentation to said tribunals or rejection in so far as presented as provided for in said Act, became and was deemed, held and considered a part of the public domain of the United States. And said evidence is inadmissible to call in question or impair or impeach said Act or its effect as aforesaid. And that its admission would be in violation of the said Federal laws and constitution.

6th.

That the courts of the state of California under said laws and constitution have no jurisdiction, concurrent, original or appellate to reverse, revise, review or modify or adjudicate the aforesaid Act of Congress of March 3rd, 1851, or said claim of plaintiff, or said decrees or patents, thereunder relating to said claim of said plaintiff under said evidence, and that said evidence is inadmissible
63 for any such purpose or for any purpose whatever, and that this court has no jurisdiction to consider the same. And that its admission would be in violation of the said Federal laws and constitution.

7th.

That by the third section of the Act of Congress of Sept. 9th, 1850, admitting the state of California into the Union, the people of this state, by their courts, legislature or otherwise are prohibited from ever interfering with the aforesaid primary disposal of the public lands within its limits, and from ever passing any law or doing any act whereby said title of the United States and its right to dispose of the same shall be impaired or questioned, and said evidence is inadmissible to impair or question the said primary disposal of said premises, either to the plaintiff or this defendant, as determined by said Act of Congress, and the decrees of said tribunals and by said patents thereunder. And that said evidence and the said Acts of the legislature of this state, and judgments of the court of this state so far as to the contrary are without jurisdiction and void and contrary to said Acts of Congress and the constitution of the United States, and inadmissible to in any manner impair or question the disposal of said premises as determined by said Act
of Congress of March 3rd, 1851, and by the decrees of said
64 tribunals thereunder and by said patents. And that said act, decrees, and patents are final and conclusive of the rights of the parties to this action and said patents are the exclusive evidence thereof. And that its admission would be in violation of the said Federal laws and constitution.

8th.

That all and each of said facts are irrelevant and inadmissible under the pleadings and do not support or tend to support any allegation in the plaintiff's complaint contained. And that the admission thereof would be in violation of the said Federal laws and constitution.

Statutes.

9th. That said statutes of California are null and void and in violation of the constitution of the United States and of said Acts of Congress in so far as they attempt or purport to convey any right or title in or to the premises and land claimed by these defendants. That the said legislature and state of California had no title to the premises to convey, and are not shown by any evidence to have had any such title, and that the admission thereof would be in violation of the said Federal laws and constitution.

Ordinance.

10th. That said ordinances and proceedings of the city of
65 Los Angeles, are irrelevant, inadmissible, incompetent, and
immaterial, being *ex parte*, and without jurisdiction of these
defendants or of the premises claimed by them herein, or of their
predecessors in interest, and they relate to and are limited to the
corporate limits of said city, which do not include the premises
claimed by these defendants herein, and do not support or tend to
support any allegation in plaintiff's complaint contained, and their
admission would be, and is in violation of said Federal laws and
constitution.

11th. That the city of Los Angeles succeeded to no rights of the former pueblo of Los Angeles, to the said real property claimed to be "so owned in fee simple" by the plaintiff in its complaint herein.

That all rights of said pueblo to said real property so claimed by plaintiff herein, not presented to, or in so far as presented rejected by said tribunals under the said Act of Congress of March 3rd, 1851, reverted to and became a part of the public domain of the United States. And that the patent aforesaid of August 6th, 1866, issued to the plaintiff is the only and exclusive, and conclusive evidence of plaintiff's title. And that to admit the said stipulated facts objected to would be in violation of the said Federal Laws and constitution.

And said case and claim of the city of Los Angeles are *res*
66 *adjudicate* as to all rights or title of the city of Los Angeles,
derived from the Spanish or Mexican government, and that
the said city is barred and estopped by said decrees and patent from
asserting any other or further claim, right or title, from or under
said government than as designated in said decrees and patent in
said case do not include the premises claimed by these defendants
herein.

That the city of Los Angeles succeeded to no right under the Spanish or Mexican governments except such as are designated in said patent from the United States to the city of Los Angeles, dated

August 9th, 1866, and that all said evidence to the contrary is irrelevant, incompetent and inadmissible, and its admission would be in violation of the said Federal laws and constitution.

12th. That the admission of each and every part of said evidence to the contrary of said decrees and patents to the plaintiff or defendants would be in violation of said Federal laws and constitution.

R. M. WIDNEY,
Attorney for Defendants.

Duly served and filed March 13, 1906.

67

[Title of Court and Cause.]

Entry on Minutes of the Court June 25, 1906.

This cause having been submitted upon the stipulation of facts duly filed herein; and it appearing in connection with said stipulation of facts that the defendants presented to the court and asked that the court rule upon certain specific objections to the facts stated in the stipulation of facts, and to each stipulation of facts, as a whole and separately; and the cause having been submitted upon said stipulation of facts, subject to the right of the defendants to have from the court a ruling upon said objections:

Now, the court having considered said cause, including the said stipulation and the said objections, and the arguments of counsel, it is ordered:

1. That the said objections made by the defendants, as shown by said list of objections filed herein, are, and each of them is overruled.

2. The court orders that findings of fact be filed and a decree be entered herein as prayed for by the complaint.

Duly made and entered in the minutes of the court June 25, 1906.
Def'ts duly excepted to said ruling and order.

68

[Title of Court and Cause.]

Bill of Exceptions (No. 1.)

Be it known, that the above entitled case was submitted for the decision of this court upon an agreed stipulation of facts duly signed by the counsel for the respective parties and filed herein on the 13th day of March, 1906, which is hereby referred to and made part hereof as if fully set forth herein, on which stipulation of facts the court rendered its decision.

That at the time of filing of said stipulation of facts, and as therein provided the defendant filed its objections to the admission of certain designated portions of the facts therein stipulated, which written objections are hereby referred to and made part hereof as if fully set forth herein.

That the court reserved its rulings thereon for further consideration and said case was duly submitted to the court for its decision.

That on the 25th day of June, 1906, this court overruled said ob-

jections and made the following order entered in the minutes of the court, to-wit: Title of the Court and Cause. No. 51190.

"This case having been submitted upon the stipulation of facts duly filed herein; and it appearing in connection with said stipulation of facts that the defendants presented to the court and asked
69 that the court rule upon certain specific objections to the facts stated in the stipulation of facts as a whole and separately; and the cause having been submitted upon said stipulation of facts, subject to the right of the defendants to have from the court a ruling upon said objections:

Now, the court having considered said cause, including the said stipulation and the said objections, and the arguments of counsel, it is ordered:

1. That the said objections made by the defendants, as shown by said list of objections filed herein are, and each of them, is overruled.

2. The court orders that findings of facts be filed, and a decree be entered herein as prayed for by the complaint.

To all of which ruling the defendant duly excepted, and thereupon this bill of exceptions was duly made and allowed by this court.

July 2, 1906.

N. P. CONREY,
Judge of said Court.

Duly made and filed July 2, 1906.

[Title of Court and Cause.]

Findings.

The above entitled action, having been tried by the court, upon a stipulation of facts, made and filed herein, by the parties hereto, and said action having been submitted to the court for decision, the court now makes and files its findings and decision, and finds the following to be the facts:

70

I.

All of the allegations of the complaint are true.

II.

Plaintiff is not estopped or barred by reason of any of the facts set forth in the answer herein, to claim or maintain, in whole or in part, the paramount right alleged in the complaint to be owned by it in respect to any of the waters of said river.

III.

Plaintiff is not estopped by the decree, rendered by the board of land commissioners, under the Act of Congress of March 3, 1851, confirming to the mayor and common council of the city of Los Angeles, the four square leagues of pueblo lands of said city, or by any of the proceedings, in the matter of the claim of said mayor and common council for said pueblo lands, mentioned in the answer herein,—to claim, or maintain, in whole or part, the ownership of

the paramount right, alleged in the complaint to be owned by plaintiff, with respect to any of the waters of said river; nor is plaintiff estopped to claim or maintain such ownership by reason of any decree, judgment, patent or proceeding, mentioned in the answer herein.

IV.

Plaintiff's cause of action is not barred by the provisions of sections 315, 316, 318 and 319 of the Code of Civil Procedure of the state of California, nor by the provisions of any one or more of said sections, nor by the provisions of any other statute of limitations of the state of California.

As conclusions of law, the court finds and decides that the plaintiff is entitled to a judgment and decree, awarding to it the following relief:

1. Adjudging that all of the underground waters in all of the lands in the complaint described, from the surface of the ground down to bed rock, are part of the flowing stream of the Los Angeles river, mentioned in the complaint herein.

2. Adjudging that said plaintiff is the owner in fee simple of the paramount right to take and use all of the waters of said Los Angeles river, (as well its branches as the main stream and including all of the underground waters in said land of said defendant, from the surface of the ground down to bedrock), from its sources to the southern boundary of said city of Los Angeles, so far as may be reasonably necessary, from time to time, to give an ample supply of water for the use of its inhabitants, and for all municipal and public uses and for the purposes of said plaintiff, (including, in such municipal and public uses and purposes the extinguishment of fires, the sprinkling of streets and other public places, the irrigation of public parks, and the creation and maintenance of artificial ponds and lakes therein, and the flushing of all internal and outfall sewers of said city, as well as all other municipal uses and purposes), for

72 which this plaintiff and its inhabitants may require water within the limits of said city of Los Angeles, as such limits may exist at the time of such taking and use, (but not including the irrigation of farming lands outside of the pueblo lands of plaintiff described in the patent from the United States to the mayor and common council of the city of Los Angeles, that is to say, lands which are used for carrying on the business of agriculture in any of its forms or branches); and that said defendant has not any estate, right, title or interest, of, in, or to said waters, or any part thereof, or of, in or to the use of the same, or any right to take or use said waters, or any part thereof, save and except in subordination and subject to the said paramount right of said plaintiff; and all persons and every person claiming or to claim under it, by or through title or right derived or acquired subsequently to the commencement of this action, be perpetually enjoined and restrained from claiming or asserting any claim to any estate, right, title or interest, of, in or to said waters, of said river, or any part thereof, or of, in or to the use of the same, or any right to take or use said waters, or any part thereof, except in subordination and subject to

the said paramount right of said plaintiff, and from claiming or asserting any claim that the right of taking or using said waters or any part thereof, except in subordination and subject to
73 the said paramount right of said plaintiff, appertains or belongs to or forms part or parcel of said lands, or any part thereof, or that there appertain or belong to or form part of said lands, or any part thereof, any riparian or other rights with respect to the said waters, or any part thereof, except in subordination and subject to said paramount right.

3. Adjudging that no right of taking or using said waters of said river, or any part thereof, appertains or belongs to or forms part or parcel of said lands, or any part thereof, nor does there appertain or belong to or form part or parcel of said lands, or any part thereof, any riparian or other rights with respect to said waters, or any part thereof, or with respect to the taking or using of said waters, or any part thereof, save in subordination and subject to said paramount right.

4. Adjudging that the plaintiff have and recover of and from the defendant, Los Angeles Farming and Milling Company, plaintiff's costs and disbursements, incurred in this action.

Let a decree be entered accordingly.

Dated Aug. 2, 1906.

N. P. CONREY,
Judge of the Superior Court.

Duly filed Aug. 2, 1906.

[Title of Court and Cause.]

Bill of Exceptions (No. 2).

Be it known that the above entitled case was duly submitted for the decision of this court upon an agreed stipulation of facts duly signed by the counsel for the respective parties, and filed herein on the 13th day of March, 1906. Wherein counsel also stipulated "That the case made on the complaint and answer, shall be submitted and decided on the foregoing stipulation of facts, without any other evidence on the part of either party, and such stipulation of facts is hereby made irrevocable."

Which stipulation of facts is hereby referred to and made a part hereof as if fully set forth herein, which stipulation of facts the court constituted all the evidence considered by the court in its decision of the case herein, that on this 2 day of Aug., 1906, the court made and filed certain findings of facts in addition to said stipulation of facts, which findings of facts are hereby referred to and made part hereof as if fully set forth herein, to which findings of facts and to the filing thereof, and to the entry of any judgment based thereon, and to the entry of any judgment not based on said facts as stipulated by counsel as aforesaid, the defendant duly objected, on the ground that the same are a surplusage, and
75 immaterial and in conflict with the stipulation of facts aforesaid and are contrary thereto and are not supported by said stipulation of facts, and involve matters outside of

the case made by said complaint and answer as stipulated aforesaid, which objections were overruled by the court, to which ruling the defendant duly excepted.

Whereupon this bill of exceptions was at that time duly made and allowed by the court.

N. P. CONREY,
Judge of said Court.

The order of the court aforesaid was duly made and entered in the minutes of the court, Aug. 2, 1906.

Def't duly excepting thereto.

Duly made and filed Aug. 2, 1906.

[Title of Court and Cause.]

Judgment.

In the above entitled action, the defendant, having duly appeared by the attorney and said action having been tried by the court upon a stipulation of facts, made and filed herein by the parties hereto, Messrs. W. B. Mathews, H. T. Lee and J. R. Scott appearing as attorneys for the plaintiff and R. M. Widney, Esq., appearing as attorney for the defendant, and said action having been submitted to the court for decision and the court having this day made and 76 filed its written findings and decision in favor of the plaintiff, ordering that judgment be entered in accordance therewith;

Wherefore, by reason of the law and findings aforesaid it is ordered, adjudged and decreed that all of the underground water in all of the lands in the complaint described, from the surface of the ground, down to bed rock, are part of the flowing stream of the Los Angeles river, mentioned in the complaint herein.

It is further ordered, adjudged and decreed that said plaintiff is the owner in fee simple of the paramount right to take and use all of the waters of said Los Angeles river, (as well its branches as the main stream and including all of the underground waters in said land of said defendants, from the surface of the ground down to bed rock) from its sources to the southern boundary of said city of Los Angeles, so far as may be reasonably necessary, from time to time, to give an ample supply of water for the use of its inhabitants, and for all municipal and public uses and purposes of said plaintiff, (including in such municipal and public uses and purposes, the extinguishment of fires, the sprinkling of streets, and other public places, the irrigation of public parks, and the creation and maintenance of artificial ponds and lakes therein, and the flushing of all internal and outfall sewers of said city, as well as all other municipal uses and purposes), for which this plaintiff and its 77 inhabitants may require water, within the limits of said city of Los Angeles, as such limits may exist at the time of such taking and use, (but not including the irrigation of farming lands outside of the public lands of plaintiff described in the patent from

the United States to the mayor and common council of the city of Los Angeles, that is to say, lands which are used for carrying on the business of agriculture in any of its forms or branches); and that said defendants have not, nor has any or either of them, any estate, right, title or interest, of, in or to, said waters, or any part thereof, or of, in or to the use of the same, or any right to take or use said waters, or any part thereof, save and except in subordination and subject to the said paramount right of said plaintiff; and all persons and every person claiming or to claim under them or any one of them, by or through title or right, derived or acquired, subsequently to the commencement of this action, be perpetually enjoined and restrained from claiming or asserting any claim to any estate, right, title or interest, of, in or to said waters of said river, or any part thereof, or of, in or to the use of the same, or any right to take or use said waters, or any part thereof, except in subordination and subject to the said paramount right of said plaintiff; and from claiming

78 or asserting any claim that the right of taking or using said waters, or any part thereof, except in subordination and subject to said paramount right of said plaintiff, appertains or belongs to, or forms part or parcel of, said lands, or any part thereof, or that there appertain or belong to, or form part of said lands, or any part thereof, any riparian or other rights, with respect to the said waters, or any part thereof, except in subordination and subject to said paramount right.

It is further ordered, adjudged and decreed that no right of taking or using said waters of said river, or any part thereof, appertains or belongs to, or forms part or parcel of, said lands, or any part thereof, nor does there appertain or belong to, or form part or parcel of, said lands, or any part thereof, any riparian or other right with respect to said waters, or any part thereof, or with respect to the taking or using of said waters, or any part thereof, save in subordination and subject to said paramount right.

And it is further ordered, adjudged and decreed that said plaintiff, The City of Los Angeles, do have and recover of and from the defendant, Los Angeles Farming and Milling Company (a corporation), plaintiff's costs and disbursements incurred by said plaintiff in this action, amounting to the sum of six (\$6) dollars.

79 The following is a particular description of the lands hereinabove referred to, the same being situate in the county of Los Angeles, state of California:

Beginning at the point of intersection of the center line of the road known as the Los Angeles and Ventura road, with the westerly boundary line of the tract of land known as the property of the Lankershim Ranch, Land & Water Company, as shown and described on the plat thereof, recorded in book 31 of miscellaneous records, on pages 38-44 in the office of the county recorder of said county of Los Angeles; thence northwesterly and westerly along the center line of said road to its intersection with the easterly boundary line of a tract of land, known as the Rancho El Encino; thence northerly along said boundary line to the northeasterly corner of said rancho; thence northeasterly in a straight line to a point in the

westerly boundary line of the tract known as the property of the Lankershim Ranch, Land & Water Company, distant 22,260 feet northerly from the intersection of said line with the center line of the Los Angeles and Ventura road, said point being also the northwesterly corner of block 49 of said tract; thence southerly along said westerly boundary line to the point of beginning; being part of the tract of land known and described as the south half of the Rancho Ex-Mission of San Fernando as shown and described on the plat thereof, recorded in book 31 of miscellaneous records, page 80 75, in the office of the county recorder of said county of Los Angeles.

Thus done in open court this 2 day of Aug., 1906.

N. P. CONREY,
Judge of the Superior Court.

Duly filed Aug. 2, 1906.

Judgment entered Aug. 17, 1906, in book of judgments 145, p. 270.

[Title of Court and Cause.]

Notice of Motion.

To W. B. Mathews, attorney for plaintiff:

You will please take notice that the defendant in the above entitled case intends to move said court at the court room thereof on the 10th day of August, 1906, at 10 a. m., or as soon thereafter as counsel may be heard pursuant to section 663 and 663½ of the Code of Civil Procedure of this state, to set aside and vacate the findings and conclusions of law made and filed by the court on the 2nd of August, 1906, and the judgment of said date based thereon against defendant herein, and to correct the said conclusions of law and to enter up another and different judgment in favor of the defendant as prayed for in the answer herein, for the following causes materially affecting the substantial rights of the defendant and entitling 81 defendant to a different judgment in said action, to-wit:

1st.

That said findings of fact and conclusions of law made by the court and filed on said 2nd day of August, 1906, and the judgment based thereon, are incorrect and erroneous and are not supported by the said agreed stipulation of facts made by counsel and filed herein on the 13th day of March, 1906, and are contrary thereto and in violation thereof, and the defendant specifies the particulars of error as follows:

Specification of Errors.

First.

That the first finding aforesaid made by the court marked (I) is contrary to said agreed stipulation of facts made by counsel and filed on the 13th day of March, 1906, designated and marked therein

III, III $\frac{1}{2}$, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XXI, XXII, XXV, XXVII, and is now supported by said agreed stipulation of facts, as to the allegation therein denied by the answer of defendant, and said agreed stipulation of facts show- that no title to the premises ever accrued to plaintiff from the United States for the premises in controversy, or any part thereof.

82

Second.

That the said finding aforesaid made by the court marked (II) is contrary to the said agreed stipulation of facts made by counsel and filed on the 13th day of March, 1906, designated and marked therein, III $\frac{1}{2}$, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XXI, XXII, XXV, XXVII, and is not supported by said stipulation of facts, and no title is shown to have accrued to plaintiff from the United States for the premises in controversy.

Third.

That the third finding aforesaid made by the court marked (III) is contrary to the said agreed stipulation of facts made by counsel and filed on the 13th day of March, 1906, designated and marked therein III $\frac{1}{2}$, IV, V, VI, VII, VIII, IX, X, XII, XIII, XV, XXI, XXII, XXV, XXVII, and is not supported by said agreed stipulation of facts.

Fourth.

That the fourth finding aforesaid made by the court marked (IV) is contrary to said agreed stipulation of facts made by counsel and filed on the 13th day of March, 1906, designated and marked therein XII, XIII, XIV, XV, XXVII, and is not supported by said agreed stipulation of facts.

83

Fifth.

That the conclusions of law made by the court and filed on the 2nd day of August, 1906, marked 1, 2, 3, 4, and each of them, are incorrect and erroneous and not consistent with, and are not supported by the said agreed stipulation of facts made by counsel and filed on the 13th day of March, 1906, designated and marked therein, III $\frac{1}{2}$, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XXI, XXII, XXIV, XXV, XXVII and no title to the premises in controversy is shown to have accrued to plaintiff from the United States, for the premises in controversy.

Sixth.

That the conclusions of law that the plaintiff is entitled to a perpetual injunction as set out in said conclusions of law 2 and 3 are also not supported by the pleadings or said agreed stipulation of facts made by counsel and filed as aforesaid and designated XXVII therein and is contrary to said pleadings and said agreed stipulation of facts by counsel.

Seventh.

That said judgment made and entered by the court on said August 2, 1906, is not supported by, and is contrary to said agreed stipulation of facts made by counsel herein, and filed on the 84 13th day of March, 1906, and designated and marked III $\frac{1}{2}$, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XXI, XXII, XXIV, XXV, XXVII, and is also against and not supported by the pleadings as to decreeing a perpetual injunction against the defendant or any injunction whatever, and no title to the premises in controversy is shown by the said agreed stipulation of facts to have accrued to the plaintiff from the United States.

Eighth.

The defendant further moves the court to correct said conclusions of law by substituting therefor the following as the correct conclusions of law based on said agreed stipulation of facts made by counsel herein and filed on the 13th day of March, 1906, to-wit:

*Conclusions of Law.***First.**

That by virtue of the treaty of Guadalupe Hidalgo between the Republic of Mexico and the Government of the United States the legal title in fee to the premises in controversy was vested in the government of the United States.

Second.

That by virtue of the proceedings, decrees and patent of the tribunals of the United States under the Act of Congress of March 3, 1851, entitled An Act to ascertain and settle the private land 85 claims in the state of California, in the matter of the claims of the city of Los Angeles thereunder as stipulated by counsel in said agreed stipulation of facts filed herein the 13th day of March, 1906, and designated therein III, III $\frac{1}{2}$, V, VI, VII, VIII, IX, X, XI, it was adjudicated that the claim of the city of Los Angeles to the premises in controversy was invalid and was rejected, and said adjudication is final and conclusive against the city herein as to the premises in controversy, and is *res adjudicata* between the said city of Los Angeles and the United States as predecessor in interest of the defendant herein, and no title to the premises in controversy has ever accrued to plaintiff from the United States.

Third.

That by virtue of the proceedings, decrees and patents of the said tribunals under said Act of Congress as stipulated in said agreed stipulation of facts made and filed by counsel as aforesaid therein designated XII, XIII, XV, the legal title in fee to the premises in controversy was conveyed to the predecessors in interest of the defendant free of every sort of servitude, vesting the legal title to said premises and every part and parcel thereof, without any reservation

or exception of any rights to said river Los Angeles, or its sources
86 or tributaries or the waters thereof, conveying by said pro-
ceedings, decrees and patents said premises therein described,
and the waters therein, thereon and riparian thereto and
the usufruct thereof as a part and parcel of said land, in common
with the other riparian owners of land. And that by said agreed
stipulation of facts XIII, the defendant is now vested with the legal
title to the premises in controversy.

Fourth.

That by reason of said agreed stipulation of facts made as afore-
said by counsel and filed herein, designated XIV, XII, the right of
action herein by the plaintiff is barred by the provision of sections
315, 316, 318, 319, of the Code of Civil Procedure of the state of
California.

Fifth.

That by virtue of the section 3 of the Act of Congress of Sept. 9,
1850, entitled an Act admitting the state of California into the
Union, the various acts of the legislature of the state of California
relating to the primary disposal of the premises in controversy or in
any manner impairing or calling in question the validity of the
title as determined and passed by said proceedings, decrees and pat-
ents of said tribunals under said Act of Congress of March 3, 1851,
entitled An Act to ascertain and settle the private land claims in
the state of California, are null and void in that respect.

87 And by the agreed stipulation of facts made by counsel
and filed as aforesaid and designated XIII, that at the time
of the commencement of this action and trial thereof the defendant
Los Angeles Farming and Milling Co. owned all of the right, title
and interest that was ever owned by the patentee of said rancho
under said United States patent therefor so far as it relates to the
premises in controversy.

Sixth.

That the defendant is entitled to have judgment as prayed for in
the answer herein.

Wherefore it is so ordered.

Said motion will be based on the judgment roll herein including
therein said agreed stipulation of facts made by counsel and filed
herein on the 13th day of March, 1906.

R. M. WIDNEY,
Attorney for Defendant.

The above motion may be set for hearing by the court at any
time without further notice.

W. B. MATHEWS,
Attorney for Plaintiff.

Duly served and filed August 4th, 1906.

Order of court denying the foregoing motion made and entered
in the minutes of the court Aug. 10, 1906, attys. for ptff. and deft.
being present and submitting said motion.

Deft. duly excepted to the ruling of the court.

MAPS

TOO

LARGE

FOR

FILMING

[Title of Court and Cause.]

Notice of Appeal.

You will please take notice that the said defendants in the above entitled action hereby appeal to the Supreme Court of the state of California from the order of the court, made and entered June 25th, 1906, overruling defts. objections to the admissibility of certain stipulated facts, also from the order of the court made and entered Aug. 2nd, 1906, overruling defendants objections to certain findings and judgment therein by the court, also from the order of the court made and entered Aug. 10th, 1903, denying defendants motion to correct the conclusion of law and set aside the judgment rendered therein on the 2nd day of August, 1906, also from the judgment therein entered in the said Superior Court on the 17th day of August, 1906, in favor of said plaintiff in said action and against said defendants and from the whole thereof.

Dated this 18th day of August, 1906.

R. M. WIDNEY,
Att'y for said Defendants.

To the Clerk of said Court and W. B. Mathews, H. T. Lee, and J. R. Scott, attorneys for said Plaintiff.

89 The undertaking on appeal herein is hereby waived by defendant.

W. B. MATHEWS,
H. T. LEE,
J. R. SCOTT,

Att'ys for P'tff.

Duly served and filed Aug. 18th, 1906.

[Title of Court and Cause.]

Authentication of Transcript.

It is hereby stipulated by the parties to said action, plaintiff and defendant, that the foregoing transcript on appeal is correct, and shall constitute the transcript on appeal herein, and that the documents, orders, and endorsements therein appearing are true and correct copies of the original records in said case, and constitute the papers used on the hearing of said case and motions, the words title of said court and cause, being used for the full title of said court and cause.

Any errors or omissions therein may be corrected at any time by either party serving on the other a copy of such correction without any notice relating to the same. The undertaking on appeal was duly waived by plaintiff.

W. B. MATHEWS,
H. T. LEE,
J. R. SCOTT,

Attorneys for Plaintiff and Respondent.

R. M. WIDNEY,
Attorney for Defendant and Appellant.

(Here follows map marked page 91.)

92 Received copy of the within for the judge who tried the case this 27 day of August, A. D., 1906.

C. G. KEYES,
County Clerk,
By C. ENYEART,
Deputy Clerk.

Due service of the within, and receipt of a copy hereof, is hereby admitted this 27 day of August, A. D., 1906.

W. B. MATHEWS,
H. T. LEE,
J. R. SCOTT,
Attorneys for Respondent.

THE CITY OF LOS ANGELES, Plaintiff and Respondent,
v.

THE LOS ANGELES FARMING AND MILLING COMPANY (a Corporation), Defendant and Appellant.

The plaintiff is a municipal corporation. Its corporate territory is situated on the Los Angeles river, an unnavigable stream which rises in the San Fernando valley several miles above and northerly of the city and flows southerly until it reaches the northern corporate boundaries of the city. The defendant is the owner in fee of land on and riparian to said river and situated about ten miles above the city. The plaintiff claims, as successor of a Spanish and Mexican pueblo, the prior and paramount ownership of the use of the water of the river from its source to the city and from the surface to bed rock, so far as the same may be necessary to give an adequate supply of water for the use of its inhabitants, and for municipal and public uses and purposes of plaintiff. Defendant denies that plaintiff has any such asserted ownership and claims that as owner in fee of the said land, and as part and parcel thereof, it

has the riparian right to the use of the water of the river as 94 it flows through its land. This action was brought to quiet

plaintiff's title and ownership of the use of said water as above stated, and to have it adjudicated that any right which the defendant may have to the use of the water is subordinate and subject to plaintiff's said ownership. The case was tried without a jury, and judgment was rendered for plaintiff as prayed for, and defendant appeals from the judgment. It also appealed from several orders denying certain motions made by defendant; but these appeals do not present any question substantially different from those presented by the appeal from the judgment; and if the judgment should be affirmed so also should be the orders.

The case was submitted on a stipulated statement of facts. The court, however, made a few additional findings, and appellant contends that it was error to make these findings and that for this reason the judgment should be reversed. The making of these ad-

ditional findings was unnecessary, and perhaps improper and erroneous; but it does not follow that for this reason the judgment should be reversed. So far as the findings may be considered as findings of fact they do not materially change the facts as stipulated; and if the stipulated facts warrant a judgment it should stand. (*Higgins v. San Diego Sav. Bank*, 120 Cal. 184; *McMenomy v. White*, 115 Cal. 339.)

It is not necessary to recite here in any great detail the facts as stipulated. Indeed the situation of the city of Los Angeles with respect to the Los Angeles river, and its claim to the use of the water of the river, have been quite fully stated in former opinions of this court and are familiar facts. (*Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237; *City of Los Angeles v. Pomeroy*, 124 Cal. 597.) For the purposes of this appeal it is necessary to state only the following facts: In the year 1781, under Spanish rule, the pueblo of Nuestra Senora Reina de Los Angeles was established, embracing four square leagues of land which is included in and is part of the present city of Los Angeles. This pueblo continued in existence under Spanish and Mexican dominion until after the acquisition of California by the United States in February, 1848, under the treaty of Guadalupe Hidalgo. It is stipulated that "Under the laws of the Kingdom of Spain, said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the present case, to use all the water of the river, and such paramount right continued to exist under that government, and the Mexican government, until the acquisition of California by the United States."

The plaintiff was first organized as a municipal corporation on April 4, 1850, by an act of the legislature of California and, 96 with various changes in its charter, has continuously been a municipal corporation ever since. On October 26, 1852, it filed a petition with the board of land commissioners created by the well-known act of congress of March 3, 1851, entitled, "An act to ascertain and settle the private land claims in the state of California." In this proceeding it claimed title in fee to a "tract of land" known as the "pueblo lands" of the pueblo of San Francisco founded upon the Spanish grant of 1781, and alleged to contain sixteen square leagues. The commissioners rendered a decision in which they held that the city was entitled to said pueblo lands, but that they embraced only four square leagues, and the claim of the city to the other part of the alleged sixteen leagues was rejected. In accordance with this decision a patent of the United States was afterwards, on August 9, 1866, issued to plaintiff for the four square leagues. The land owned by appellant, the Los Angeles Farming and Milling Company, was granted by the Mexican government to the predecessors of appellant in 1846, and was presented to the said board of land commissioners, and after proper proceedings regularly taken a patent of the United States was on June 8, 1873, duly issued to said predecessors for a tract of land through a part of which the Los Angeles river flows, so that the

land is riparian to said river. The patent does not contain
97 on its face any reservation or exception.

Appellant contends that the above two proceedings before
the land commissioners and the patents which followed, constitute
final adjudications: First, that the city had only title to four square
leagues of land with such appurtenances as regularly belonged to
the ownership in fee of lands, but had not any ownership in the use
of the water above the limits of the land granted, such as is alleged
to have belonged to the old pueblo; and, second, that the patent to
appellant's predecessors finally adjudicated that they were the ri-
parian owners of the use of the waters of the river running through
the land, as part and parcel of their estate. This contention is
not maintainable. The act of March 3rd was intended to segregate
private from public lands; no word designating property is
used in it other than "land." Appellant contends that the city, in
its petition to the commissioners, should have set up its claim to
the pueblo claim to the water, but the act does not contemplate pre-
sentation of a claim to anything but "land." The city was no more
called upon to set up its water rights as successors to the pueblo
than were appellant's predecessors called upon to set up the riparian
rights of the owners of the land claimed by them. Of course,
the word "land" as a conveyance, carried every kind of property

right, and appurtenance, which is legally embraced in that
98 word; but what rights go to a patentee of land depends,

not upon any supposed adjudication contained in the patent,
but upon the general law of the state where the land is situated;
and those rights may be essentially different in different localities.
For instance, if a piece of patented land is in a state or territory
where the English common law doctrine of riparian ownership
prevails to the full extent, the patentee of the land if it is situated
on a natural water course, would have the right to have the
water of the stream flow down to his land without any material
diminution in quantity, and could have the upper riparian pro-
prietor enjoined from diverting the water in any way or for any
purpose which would materially diminish the flow, but such right
would not accrue to a patentee of land in an arid region of a western
state where irrigation is necessary to successful agriculture and
where the original rule as to riparian ownership has been modified
by the state law, so as to allow a riparian proprietor to divert a rea-
sonable amount of the water of a stream and use it to irrigate his
riparian land although a material part of the water would be ab-
sorbed and prevented from flowing down to the lower proprietor.
It is quite clear that the rights which are embraced in the word

"land" are determined by the law of the country where the
99 land is situated. In *Hardin v. Jordan*, 140 U. S. 371, the
Supreme Court of the United States say: "In our judgment
the grants of the government of lands bounded on streams and other
waters, without any reservation or restriction of terms, are to be
construed as to their effect according to the law of the state in which
the lands lie." The right of a riparian owner in fee of land to the
use of natural water running through it is subordinate to any para-

mount right to the use of such water existing under the general law in some other person.

The only question in the case therefore is whether under the general law of the locality the old pueblo of Los Angeles, and the respondent herein, as its successor, had and have, as against appellant the prior and paramount ownership of the use of so much of the water of the Los Angeles river as is necessary for its inhabitants and for general municipal purposes; and this question need not be discussed as an original one, for it has been answered in the affirmative by former decisions of this court. In *Lux v. Haggin*, 69 Cal. 255, the whole subject of water rights in California, both before and after American dominion, was involved, and extensively discussed. The law on the subject under Spanish and Mexican rule was very fully considered. As to pueblo rights the court says:

"The laws of Mexico relating to pueblos conferred on the 100 town authorities the power of distributing to the common

lands and to its inhabitants, the waters of an innavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo, but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the pobladores, the irrigable lands and the mills and manufactories within the general limits, were vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers." It is further said: "Each pueblo was quasi a public corporation. By the scheme of the Mexican law it was treated an entity or person, having a right as such, and by reason of its title to the four leagues of land, to the use of the water of the river on which it is situated, while as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred." And it is further said: "From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the water; and semble that the pueblos had a preference or prior right to consume the waters even as against

an upper riparian proprietor." In *Vernon Irrigation Company v. City of Los Angeles, et al.*, the present plaintiff was a

101 defendant, and the rights of the old pueblos and of the present city as its successor were directly involved. The opinion of the court delivered by the late Justice Temple, then commissioner, contained an exhaustive review of the Spanish and Mexican law on the subject. The views expressed in *Lux v. Haggin* as to the rights of the pueblo in the waters of the river are approved. The opinion is very lengthy and we will quote only an expression or two from it. It is said: "Our courts have determined that the successors of *of* these pueblos hold the public lands in trust for the inhabitants and that the legislature can control the execution of the trust; and that the United States, has in accordance with the decisions confirmed the lands to the successors of the pueblos." And it is further said: "I am satisfied with the conclusion reached

in *Lux v. Haggan, supra*, that pueblos had a right to the water which had been appropriated to the use of the inhabitants similar to that which it had in the pueblo lands, and that the right of its successor, the city to the water, for its inhabitants and for municipal purposes, is superior to the rights of plaintiff as a riparian owner." *City of Los Angeles v. Pomeroy* 124 Cal. 597, is another case in which the right of the old pueblo and the present plaintiff to the waters of the river were immediately involved. An exhaustive opinion is also written in this case by the chief justice, speaking for the court, and the conclusion reached in *Vernon Irrigation Company* is approved, the court saying: "But the appellants go still further and contend that when the land in controversy was granted to their predecessors there was no pueblo of Los Angeles, and consequently no pueblo right to which any of their rights could be subordinated. * * * This question, however, ought to be considered closed by the previous decisions of this court in the *Vernon Irrigation Company* case and others. All of the laws and public documents upon which its solution depends are within the judicial cognizance of the courts, and whether they were actually noticed or not in previous decisions, they must be deemed to have been considered and allowed their due weight. The question is one of law, rather than of fact, and its decision in one case is a precedent in others."

The foregoing decisions are determinative of the prior and paramount right of the pueblo, and of plaintiff as its successor to the use of the water of the river necessary for its inhabitants and for ordinary municipal purposes. The question as to what extent this right goes, a question somewhat considered in the *Pomeroy* case—that is, for the use of the inhabitants of what territory, and for what 103 municipal purposes can the water be taken as against a riparian owner—does not arise and need not be considered in the case at bar. Appellant's case is presented in the record as resting upon the proposition that neither the pueblo nor the plaintiff has or had any right whatever to use water of the river that is prior or paramount to appellant's right as a riparian proprietor; and the present decision would not be authority in a case, if any such case should ever arise, where the question would be as to the extent of plaintiff's prior and paramount right, and not as to the existence of that right to any extent.

The judgment not only quiets plaintiff's title, but also enjoins appellant from doing certain acts; and appellant contends that the injunction was erroneous because no injunction was prayed for in the complaint, and no facts are alleged which would support an injunction. So far as the prayer is concerned the general prayer for relief is sufficient, and the facts alleged warranted an injunction, so that this contention cannot be maintained. Moreover, the injunction is of very little importance and it cannot be prejudicial to appellant. It does not enjoin appellant from interfering with any particular amount of water, but merely restrains it "from claiming or asserting any right to the water, except in subordination and subject to the

104 said paramount right of said plaintiff." This is merely in accord with the part of the judgment which quiets the title, and adds nothing of consequence to it.

The judgment and orders appealed from are affirmed.

McFARLAND, J.

We concur: Loringan, J., Henshaw, J.

Filed January 23, 1908.

F. L. CAUGHEY, Clerk,
By ERB, Deputy.

Bank.

L. A. No. 1952.

THE CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Respondent,

v.
LOS ANGELES FARMING & MILLING COMPANY (a Corporation), Defendant and Appellant.

In recording the order denying a rehearing of this cause, I desire to protest against the citation of my opinion in the City of Los Angeles *v.* Pomeroy as authority for the affirmance of this judgment. It is true that the opinion of Justice Temple in that case, which was concurred in by a majority of the justices, furnished a precedent for the present decision, but that opinion, it will be seen by reference to page 647 of the report (124 Cal.) was written for the express purpose of overriding that portion of my opinion commencing on page 639,

in which I expressly deny the rights here asserted and upheld. In my opinion the paramount right of Los Angeles to

the waters of the Los Angeles river is limited to that part of the present city comprised in the four leagues (about 17,500 acres) constituting the original pueblo, and cannot be asserted for the satisfaction of the wants of the additional 10,400 acres added by the amended act of incorporation, or the territory since added and that may be hereafter added by the joint action of the municipal authorities, and the inhabitants of the extensive unincorporated area adjoining the city.

But this is what is now decided to be the law: The city of Los Angeles as it has been enlarged far beyond the limits of the old pueblo and as it may be indefinitely enlarged in the future, has a paramount right over all riparian proprietors above the city to the use of all the water necessary to the supply of its inhabitants. It may annex all the lands between it and the ocean, including a vast area not riparian to the Los Angeles river, and the inhabitants of this annexed territory immediately become invested with the paramount right to the water flowing in the tributaries of the river, whether above or below ground notwithstanding they have been used for a hundred years by the grantees of Spain and Mexico, and their successors, of lands riparian to the stream. This is, I concede, the

logical outcome of the decision of the court in Los Angeles
 106 *v.* Pomeroy, but it is a doctrine which I disclaimed in that
 case, and for which neither Lux *v.* Haggin nor Vernon Dis-
 trict *v.* Los Angeles is authority.

BEATTY, C. J.

Filed Feb. 21, 1908.

F. L. CAUGHEY, Clerk,
 By ERB, Deputy.

Minutes of Supreme Court, p. 101.

In Bank.

THURSDAY, Feb'y 20, 1908.

L. A. 1952.

CITY OF L. A.

v.
 L. A. F. & MILLING CO.

By the COURT: Rehearing denied.

107 In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and
 Respondent (Defendant in Error),

vs.
 LOS ANGELES FARMING AND MILLING COMPANY, a Corporation,
 Defendant and Appellant (Plaintiff in Error).

Petition for Writ of Error.

To the Honorable W. H. Beatty, Chief Justice of the Supreme Court
 of the State of California:

The petition of said Los Angeles Farming and Milling Company,
 a corporation, (plaintiff in error herein) respectfully shows, that
 said the city of Los Angeles, a municipal corporation (defendant in
 error herein) as plaintiff in the trial court brought the above entitled
 suit against the said Los Angeles Farming and Milling Company,
 a corporation, as defendant in the Superior Court of the state of
 California in and for the county of Los Angeles, by filing its com-
 plaint therein, and after answer by said defendant duly made and
 filed therein, counsel for said plaintiff and defendant duly
 108 made and filed in said cause, a stipulation in writing of all
 the facts on which said case was to be submitted, without any
 further evidence by either party, for said court to determin- fully
 the issues in the case made by the complaint and answer therein;

and said case having been duly submitted pursuant to said stipulation to the said court for its decision, said Superior Court rendered its orders, decision, and judgment therein, overruling said defendant's objections to the admission of certain evidence, and ordering, adjudging and decreeing that said plaintiff, the city of Los Angeles, a municipal corporation, was at the date of its incorporation in 1850, and ever since and now is the owner in fee simple of the paramount right to take and use all of the waters of the Los Angeles river that are on, in or riparian to said defendant's land from the surface of the ground down to bed rock, whenever the said city may have need thereof from time to time for municipal uses, and that said defendant has not any estate, right, title or interest, of, in or to the use of the same, or any part thereof, or of, in or to the use of the same or any right to take or use said waters, or any part -hereof, save and except in subordination and subject to the said paramount right of said plaintiff, and that said paramount right to so take and

use said waters or any part thereof in said defendant's land
109 does not appertain or belong to, or form part or parcel of said

defendant's land, or any part thereof, nor does there appertain or belong to, or form part or parcel of said defendant's said land, or any part thereof, any riparian right or other right with respect to said waters, or any part thereof, or with respect to the taking or using of said waters, or any part thereof save and in subordination and subject to said paramount right of said city of Los Angeles to take and use the same as it may have need therefor for municipal and other purposes, being the premises in controversy herein, and claimed by said defendant as part and parcel of its land under its patent therfor from the United States, and adjudging and decreeing that the facts pleaded in defendant's answer relating to the proceedings, decrees, and patents of the tribunals of the United States under and by virtue of the act of congress entitled "An act to ascertain and settle the private land claims in the state of California, approved March 3rd, 1851, had no jurisdiction over said premises of said defendant and that said proceedings, decrees and patents of said tribunals under said act or any of the facts pleaded in said defendant's answer, are not *res adjudicata*, nor a bar, nor an estoppel of said claim of said city sued on therein, and for costs. As all of which will more fully appear by reference to the record and proceedings in said case.

110 That said defendant therein duly appealed to the said Supreme Court of California from said judgment and orders and from the whole thereof in said case so made.

That on January 23rd, 1908, said court in Department Two thereof affirmed the judgment and orders of said Superior Court in said case against this defendant therein, and filed its opinion and decision therein.

That on the 6th day of February, 1908, the said defendant therein duly filed its petition for a hearing in bank before the full court in said Supreme Court, and submitted the same in manner and form as required by law.

That on February 20th, 1908, said court denied a hearing in bank, and said petition.

And thereupon said judgment became final and a remittitur was ordered to be issued to said Superior Court.

That said court in the highest court of said state in which a judgment and decision in said suit could be had, and that the same is final. And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under sec. 709 of the revised statutes, and laws of the United States, because;

That in said action, judgment and decrees, there are necessarily drawn in question the construction, force, effect and validity of the Treaty of Guadalupe Hidalgo of February 2, 1848, between the United States and the Republic of Mexico, and of the statute of congress of March 3, 1851, entitled an act to ascertain and settle the private land claims in the state of California, and of the authority, force and effect of the tribunals thereunder; and of the force, effect and validity of proceedings, judgments, decrees and patents made thereunder by the tribunals therein provided for and duly acting by authority thereof; and under sec. 3 of the act of congress of Sept. 9, 1850, admitting the state of California into the Union, as will fully appear by reference to said defendant's answer and the proceedings and record in said case, and that said judgment, decree and orders, and decision, are against their validity, force and effect, and against the just and lawful rights of this defendant in the premises.

That in said case there are necessarily drawn in question the validity of certain statutes of the state of California, as alleged in said defendant's answer in said suit, and of the authority of the courts of said state exercised thereunder and the same are repugnant to the constitution and, said treaty, and laws of the United States, and the said decision and judgment and decrees of the state court in this case are in favor of their validity, and against the just and lawful rights of this defendant in the premises.

112 That in said case, said defendant specially set up and claimed and does claim its title, right, privilege, and immunity to its said premises in controversy herein under the aforesaid constitution, treaty, and statute and laws of the United States, and authority exercised thereunder, and under the United States in its proceedings, tribunals, decrees and patents thereunder, and said decrees, and judgment of said Supreme Court of California are against the said title, right, and privilege so specially set up and claimed in said case, by said defendant in its answer in said action, and against the just and lawful rights of this defendant in the premises, as fully appears by reference to said defendant's answer and the proceedings and record in said case, which is herewith submitted.

Wherefore, your petitioner being dissatisfied with said decrees, orders, and judgment of the Supreme Court of the state of California, prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation, and such other proceedings as may be proper herein as provided by law.

LOS ANGELES FARMING AND MILLING
COMPANY, *a Corporation, Petitioner.*
R. M. WIDNEY, *Attorney for Petitioner.*

113 The said judgment of this court in said case having become final, the foregoing petition is allowed and the writ of error ordered to issue, a bond in the sum of \$500 to be filed by the petitioner.

This 9th day of Apr., 1908.

[Seal State Supreme Court.]

W. H. BEATTY,
*Chief Justice of the Supreme Court
of the State of California.*

Filed this 10th day of April, 1908.

F. L. CAUGHEY, *Clerk,*
By R. L. DUNLAP,
Deputy Clerk.

114 In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent (Defendant in Error),

LOS ANGELES FARMING AND MILLING COMPANY, a Corporation, Defendant and Appellant (Plaintiff in Error).

Bond.

We, A. E. Pomeroy and D. E. Wellescome residents of the city and county of Los Angeles, state of California, are hereby held and firmly bound to said the city of Los Angeles, a municipal corporation, plaintiff and respondent in the above entitled action in the sum of (\$500.) five hundred dollars lawful money of the United States, to be paid to said the city of Los Angeles, a municipal corporation, or its successors; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Whereas, the said Los Angeles Farming and Milling Company, a corporation, plaintiff in error in said case, hath prosecuted 115 a writ of error to the Supreme Court of the United States, to reverse the final judgment and decree rendered in the above entitled court and cause; and the condition of this obligation is, that if said Los Angeles Farming and Milling Company, a corporation, shall prosecute its said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force.

Dated, signed and sealed this 9th day of April, 1908.

A. E. POMEROY. [SEAL.]
D. E. WELLCOME. [SEAL.]

STATE OF CALIFORNIA, *County of Los Angeles, ss:*

A. E. Pomeroy and D. E. Wellcome being each duly sworn, each and for himself deposes and says: I am one of the sureties to the foregoing bond, and subscribed my name thereto; that I am a resident and freeholder, within the state of California and county of Los Angeles, and am worth over the sum of \$500, specified in the aforesaid undertaking or bond. Over and above all my just debts and liabilities, in property situate in said state and county,
116 exclusive of property exempt from execution; that I am over the age of twenty-one years.

A. E. POMEROY. [SEAL.]
D. E. WELLCOME. [SEAL.]

Subscribed and sworn to before me this 9th day of April, 1908.

[SEAL N. P.]

GEO. POMEROY,
*Notary Public in and for the County of
Los Angeles, State of California.*

This bond as to form, effect and surety is satisfactory to the defendant in error herein.

LESLIE R. HEWITT,
H. T. LEE,
J. R. SCOTT,
W. B. MATHEWS,
Attorney- for Defendant in Error.

The foregoing bond and sureties are hereby approved this 10th day of April, 1908.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the
State of California.*

Filed the 10th day of Apr., 1908.

F. L. CAUGHEY, *Clerk,*
By R. L. DUNLAP,
Deputy Clerk.

117 *Writ of Error from the Supreme Court of the United States
to the Supreme Court of the State of California.*

In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent (Defendant in Error),
v.

LOS ANGELES FARMING AND MILLING COMPANY, a Corporation, Defendant and Appellant (Plaintiff in Error).

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the city of Los Angeles, a municipal corporation plaintiff therein, and defendant in error herein, against the Los Angeles Farming and

118 Milling Company, a corporation, defendant in said suit, and plaintiff in error herein, wherein was drawn in question the construction, force and validity of a treaty of, and of statutes of the United States and of an authority exercised, thereunder, and under the United States, and the decision was against their force, effect and validity; and wherein was drawn in question the validity of a statute or statutes of the state of California, or an authority exercised under, said statutes, and under said state of California, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such validity; and wherein was drawn in question a clause of the constitution, or of a treaty or statute or statutes of the United States, or of a commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or statutes of the United States, or commission; a manifest error hath happened to the great damage of said Los Angeles Farming and Milling Company, a corporation, plaintiff in error herein, as by its complaint and proceedings appears; and

The bond and assignment of errors required by law having been duly filed herein, now;

We being willing that error, if any hath been, should be 119 duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

gether with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days, extended herein to sixty days as provided in subdivision 4 of Rule 9 of the Supreme Court of the United States, from the day of signing the citation herein, in said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 9th day of April, 1908.

[U. S. C. Court Seal.]

W. M. VAN DYKE,

*Clerk of the United States Circuit Court, Ninth
Circuit, Southern District of California,
By CHAS. N. WILLIAMS,*

Deputy Clerk.

120 The foregoing writ is allowed this 10th day of April, 1908.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the
State of California.*

Filed the 10th day of Apr., 1908.

F. L. CAUGHEY, *Clerk,*
By R. L. DUNLAP,
Deputy Clerk.

121 In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent (Defendant in Error),

v.

LOS ANGELES FARMING AND MILLING COMPANY, a Corporation, Defendant and Appellant (Plaintiff in Error).

Assignment of Error.

Now comes the said Los Angeles Farming and Milling Company, a corporation, (plaintiff in error herein) and respectfully submits, that in the record, proceedings, decisions and final judgment of the Supreme Court of the state of California, in the above entitled action, there is manifest error, against the just rights of said plaintiff in error in this, to wit:

First. The said court erred in its said decision in adjudging, that the Treaty of Guadalupe Hidalgo of February 2, 1848, between the Republic of Mexico and the United States did not vest the legal title of the premises in controversy in the United States, subject to the

future action of congress thereto. As pleaded in the answer of this defendant (plaintiff in error) as shown by Tr. fol. 26-28.
122 And said judgment is contrary to and in violation to the form, force and effect of said treaty, and denies the rights and title of this defendant (plaintiff in error) derived and protected thereunder, to the premises in controversy.

Second. That said court erred in its said judgment in adjudging that the act of congress entitled An Act to Ascertain and Settle the Private Land Claims in the State of California, approved March 3, 1851, did not include, but excluded, the jurisdiction of the real property rights of the parties to this action, for the premises in controversy herein, as pleaded in the answer of this defendant (plaintiff in error) Tr. fol. 30-50 and as shown in the stipulation of facts on which this case was submitted in Tr. fols. 60-165. And that judgment is against the validity, force and effect of said act.

Third. Said court erred in its said decision in adjudging and construing said act of March 3, 1851, to the effect that the word "land" used therein, and in the proceedings, decrees and patents thereunder, did not include, but excluded, all the waters in, on or riparian to the land from the surface of the ground down to bed rock, and that such waters constituted no part or parcel of the lands in California, or of the land in controversy owned by said defendant (plaintiff in error), and that said act, and the decrees, and 123 patents thereunder in the said cause of the city of Los Angeles *v.* the United States, in using the word "land" therein, did not include, but excluded that part, and parcel of this defendant's land in controversy herein known and designated as the waters, in, on, and riparian to the land from the surface of the ground down to bed rock and every part thereof. And that said act, proceedings, decrees, and patent of the tribunals thereunder did not adjudicate and terminate the said claim of the city of Los Angeles to the premises in controversy therein, and herein, and were not *res adjudicata*, nor a bar, nor an estoppel herein, as pleaded in this defendant's (plaintiff in error) answer. [Tr. fols. 39-50.] In all of which said judgment is against the validity, form, force and effect of said act.

Fourth. The court erred in its decision and judgment, in that, (after holding and adjudging that the real property claimed by the city of Los Angeles in this suit was not submitted by congress by said act of March 3, 1851, to the tribunals therein provided, but was excluded from the jurisdiction thereunder) it should have decreed and adjudged that the state courts had no jurisdiction over said claim. And that no action could be maintained in said courts of justice on any title derived from the Spanish or Mexican authorities, unless jurisdiction to try and decide it has

first been conferred by act of congress; and that the legal 124 title was in the United States, so far as any such claim was concerned, and that the judgment of the lower court must be reversed on the ground that the city of Los Angeles had failed to show the legal title in itself, and judgment should have been ordered for the said defendant (plaintiff in error) as prayed for.

Fifth. The said court erred in its said judgment, in adjudging and denying to the United States patent, under which this defendant, (plaintiff in error) holds, the general common law riparian rights of the state of California, and of the United States, to wit: That the waters in, on and riparian to the land conveyed by said patent, are a part and parcel of the land, and pass with and are conveyed by the patent from the United States, to the patentee, with the general common law riparian rights to the use of the same. And the court likewise erred in construing and adjudging in said judgment, that the said patent from the United States to the city of Los Angeles, conveyed any other or greater right or title to said waters than the said general common law riparian rights, of the state of California, and of the United States gives to the said patent of this defendant (plaintiff in error), or that it in any manner, subordinates, or transfers the riparian rights, or any part or parcel thereof, or any interest, right or title thereto, of the land 125 of this defendant (plaintiff in error) to the city of Los Angeles.

And also by said construction and said judgment, said court erred in that; it thereby denied to this defendant (plaintiff in error) the equal protection of the said general common law of riparian rights, of the state of California and of the United States, as provided in Sec. 1, Art. XIV. of the Constitution of the United States.

Sixth. The said court erred in its said judgment adjudging that the said United States patent to the predecessors in title, of this defendant (plaintiff in error) as stipulated in Tr. fols. 141-145, did not convey the legal title to the premises in controversy as part and parcel of the land therein conveyed; and that said patent was not conclusive, of the legal title of the patentee, to every part and parcel of the land therein described, including the waters, in, on and riparian to said land as a part and parcel of the land itself.

The court erred in its said judgment in that when said patent was introduced in evidence, and it was stipulated [Tr. fo. 141-145] that the land in controversy was included within the boundaries of the patent, and that the patent to the city of Los Angeles did not embrace any of the lands of this defendant (plaintiff in error)

described in its said patent, and described in the complaint 126 and answer in this action [Tr. fo. 140], and that said lands of this defendant (plaintiff in error) were situated some ten miles distant from the said city of Los Angeles on said river, and above any of the points of diversion of water by said city of Los Angeles, [Tr. fo. 147] judgment should have been rendered for this defendant (plaintiff in error).

Seventh. The said court erred in its said decree and judgment, in that said judgment interferes with the primary disposal of the public lands within this state, and said judgment is an act whereby "the title of the United States to, and right to dispose of the same is impaired and questioned," as prohibited in Sec. 3, in the act of congress admitting the state of California into the Union, approved Sept. 9, 1850, in that it decrees that the word "land" in said patent

and said act of congress to ascertain and settle the private land claims in the state of California approved March 3, 1851, does not include, but excludes, that part and parcel of this defendant's land, known and described under the laws of the United States and the state of California as a part and parcel of the land itself, to wit: The waters in, on and riparian to said land, in controversy herein.

Eighth. The said court erred in its said judgment, in adjudging that the various acts of the legislature of this state, purporting to convey to the city of Los Angeles the legal title of the premises in

controversy, pleaded as null and void, in said defendant's
127 answer (plaintiff in error) [Tr. fos. 53-56] and stipulated in

Tr. fo. 68-71 and fo. 159, conveyed the legal title to the premises in controversy to the city of Los Angeles, and were valid therefor; the said acts being null and void and contrary to, and in violation of the 3rd section of said act of congress admitting the state of California into the Union, approved Sept. 9, 1850, as pleaded in this defendant's (plaintiff in error) answer in said cause as shown in Tr. fos. 52-56, and that the state of California was in line of the titles in controversy herein, and had the title to convey by said statutes. Said statutes of the state of California are repugnant to said treaty, acts of Congress and sec. 1, art XIV of the constitution of the United States, under which this defendant specially set up and claimed title herein, and said judgment is in favor of the validity of said state statutes, and is in error thereby.

Ninth. The said court erred in its said decree and judgment in adjudging that the said United States patent to the city of Los Angeles, and the said proceedings of the tribunals under said act of congress of March 3, 1851, resulting in the issuance of said patent, were not conclusive against any and all claims of the city of Los Angeles by virtue of any right, title, interest or claim derived from

the Spanish or Mexican government, in or to lands or any
128 part or parcel thereof in California lying outside of the premises described in said patent, and especially to the land of this defendant (plaintiff in error) which are stipulated [Tr. fo. 140] as not included in said patent, and [Tr. fo. 147] as being "some ten miles above the city of Los Angeles."

Tenth. Said court erred in its said judgment, in adjudging, that "said plaintiff (the city of Los Angeles), is the owner in fee simple, of the paramount right to take and use all of the waters of said Los Angeles river, (as well its branches, as the main stream and including all of the underground waters in said land of defendant, from the surface of the ground down to bed rock) from its source to the southern boundary of said city of Los Angeles, so far as may be reasonably necessary, from time to time, to give an ample supply of water for the use of its inhabitants and for all municipal and public uses and purposes," "for which said city and its inhabitants may require water within the limits of said city of Los Angeles, *as such limits may exist at the time of such taking and use,*" and that defendant (plaintiff in error) has no right to the use of said waters or any part thereof in its said lands, described

in said patent from the United States except in subordination to said paramount right of said city of Los Angeles.

And said court erred in that, said judgment does not limit
129 said right to the original pueblo limits of 17,500 acres, but
extends it to some 10,400 acres of outside non-riparian arid
lands, already added to the original pueblo four square leagues,
and as well extends said right to cover all future additions of land
to said city's area, against the just rights of this defendant (plaintiff
in error) in the premises aforesaid. Said judgment therein being
contrary to the validity, force and effect of said acts of Congress,
and decrees and patents thereunder, and of sec. 1, art. XIV of the
constitution of the United States, and is in error therein.

Eleventh. The said court erred in its judgment; in that it held
the decisions of said court in *Lux v. Haggin*, 69 Cal. 255, and
Vernon Irrigating Co. v. City of Los Angeles et al., (106 Cal. 237)
and *City of Los Angeles v. Pomeroy*, 124 Cal. 597, (to none of which
cases was this defendant or its land a party) to be determinative
of the prior and paramount right of the pueblo and the city of Los
Angeles, to the use of the waters in this defendant's lands, as against
this defendant, it not having been in the jurisdiction of said cases,
and the facts being materially different.

Whereas, said court should have adjudged that the Constitution
and laws of the United States aforesaid and patents thereunder in
the premises, and the pleadings and stipulation of facts in
130 said case were alone determinative of the rights of this defen-
dant (plaintiff in error), in this action, as stipulated by
counsel in this case (stipulation XXVII. Tr. fo. 164) and said court
erred in not so adjudging and determining the rights of this defen-
dant (plaintiff in error), in said cause on the merits of this case
as presented in the record thereof. And said court thereby erred
and denied to this plaintiff in error equal protection of the laws,
and by said judgment deprived plaintiff in error of property of the
value of over \$400,000 without due process of law, in said case,
and said Supreme Court had no original jurisdiction to apply the
facts in said cases, the same not having been introduced in evidence
in this case. All of which is contrary to sec. 1, art. XIV of the
constitution of the United States.

Twelfth. The said court erred in its judgment in overruling
and denying this defendant's (plaintiff in error) objections to the
admissibility in evidence of stipulation of facts XVI, XVII, XVIII,
XIX [Tr. fo. 166-186] to attack or vary the terms or effect of the
patents in evidence in this case.

Wherefore, this defendant (plaintiff in error) prays; that upon
a hearing in the Supreme Court of the United States, said judgment
of the Supreme Court of the state of California, be reversed and
that judgment be entered for this defendant (plaintiff in
131 error) that its riparian right to use its pro rata of the ripa-
rian waters is not subordinate to the right of the city of
Los Angeles, but that their rights are *equal*, and in *quantity* in pro-

portion to their riparian frontage on said river, and for costs, and for such other relief as may be deemed just.

R. M. WIDNEY,
Attorney for Defendant (*Plaintiff in Error*).

Filed the 10th day of Apr., 1908.

F. L. CAUGHEY, *Clerk*,
By R. L. DUNLAP,
Deputy Clerk.

132 In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent (Defendant in Error),
v.

LOS ANGELES FARMING AND MILLING COMPANY, a Corporation, Defendant and Appellant (Plaintiff in Error).

Citation.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States, to the City of Los Angeles, a Municipal Corporation in the County of Los Angeles, State of California, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, within thirty days from the date hereof, which period of thirty days is extended under subdivision 4 of Rule 9 of the Supreme Court of the United States, to sixty days from date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein Los Angeles Farming and Milling Company (a corporation) is the plaintiff in error, and you, the city of Los Angeles (a municipal corporation) are defendant in error, be — L. A. No. 1952 in the Supreme Court of said state of California, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and
133 why speedy justice should not be done, to the parties in that behalf.

Witness the Honorable Melville W. Fuller, chief justice of the Supreme Court of the United States, the 10th day of April, 1908.

[Seal S. C. Cal.]

W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

Attest:

[SEAL.] F. L. CAUGHEY,
Clerk of the Supreme Court
of the State of California.

By R. L. DUNLAP,
Deputy Clerk of said Court.

Received a copy of the above citation, and a copy of the writ of error therein mentioned, in the city of Los Angeles, county of Los Angeles, state of California, this 10th day of April, 1908. Also copy of the assignments of error.

LESLIE R. HEWITT,
J. R. SCOTT,
H. T. LEE, AND
W. B. MATHEWS,

*Attorneys for the City of Los Angeles,
Defendants in Error in said Writ.*

Filed the 10th day of April, 1908.

F. L. CAUGHEY, Clerk,
By R. L. DUNLAP,
*Deputy Clerk of the Supreme Court
of the State of California.*

134 In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent (Defendant in Error),

v.
LOS ANGELES FARMING AND MILLING COMPANY, a Corporation, Defendant and Appellant (Plaintiff in Error).

Clerk's Certificate.

I, F. L. Caughey, clerk of the Supreme Court of the state of California, hereby certify that the preceding and annexed documents constitute and are a full, true, correct and complete transcript from the records of said court of all the records and proceedings, opinions and judgments of said court in said suit, including all the proceedings in the matter of the writ of error therein, with the date of filing the same in said court.

I also hereby certify that the foregoing record contains the original writ of error, the original citation issued thereon, with the proof of service of the same, with the date of filing the same in said court.

Witness my hand and the seal of said court this 14th day of Apr., 1908.

[SEAL.]

[Seal Supreme Court of California.]

F. L. CAUGHEY, Clerk,
By R. L. DUNLAP,
Deputy Clerk.

135

Original.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of California.

In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent (Defendant in Error),

v.

LOS ANGELES FARMING AND MILLING COMPANY, a Corporation, Defendant and Appellant (Plaintiff in Error).

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the city of Los Angeles, a municipal corporation plaintiff therein, and defendant in error herein, against the Los Angeles Farming and Milling

Company, a corporation, defendant in said suit, and plaintiff
136 in error herein, wherein was drawn in question the construction, force and validity of a treaty of, and of statutes of the United States and of an authority exercised, thereunder, and under the United States, and the decision was against their force, effect and validity; and wherein was drawn in question the validity of a statute or statutes of the state of California, or an authority exercised under, said statutes, and under said state of California, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such validity; and wherein was drawn in question a clause of the constitution, or of a treaty or statute or statutes of the United States, or of a commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or statutes of the United States, or commission; a manifest error hath happened to the great damage of said Los Angeles Farming and Milling Company, a corporation, plaintiff in error herein, as by its complaint and proceedings appears; and

The bond and assignment of errors required by law having been duly filed herein, now;

We being willing that error, if any hath been, should be
137 duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court in Washington, D. C., within thirty days, extended herein to sixty days as provided in subdivision 4 of Rule 9 of the Supreme Court of the United States, from the day of signing the citation herein, in said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 9th day of April, 1908.

[U. S. C. Court Seal.]

[Seal U. S. Circuit Court, Southern District, Cal. 1886.]

WM. M. VAN DYKE,

*Clerk of the United States Circuit Court, Ninth
Circuit, Southern District of California,
By CHAS. N. WILLIAMS,
Deputy Clerk.*

138 The foregoing writ is allowed this 10th day of April, 1908.

W. H. BEATTY,
*Chief Justice of the Supreme Court
of the State of California.*

Filed the 10th day of April, 1908.

F. L. CAUGHEY, Clerk,
By R. L. DUNLAP,
Deputy Clerk.

139

Original.

In the Supreme Court of the State of California.

L. A. No. 1952.

THE CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Respondent (Defendant in Error),

v.

LOS ANGELES FARMING AND MILLING COMPANY, a Corporation, Defendant and Appellant (Plaintiff in Error).

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the City of Los Angeles, a Municipal Corporation in the County of Los Angeles, State of California, Greeting:

You are hereby cited and admonished to be and appear, at a Supreme Court of the United States, within thirty days from the date hereof, which period of thirty days is extended

under subdivision 4 of Rule 9 of the Supreme Court of the United States, to sixty days from date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein Los Angeles Farming and Milling Company (a corporation) is the plaintiff in error, and you, the city of Los Angeles (a municipal corporation) are defendant in error, be: — L. A. No. 1952 in the Supreme Court of said state of California, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should 140 not be corrected, and why speedy justice should not be done, to the parties in that behalf.

Witness the Honorable Melville W. Fuller, chief justice of the Supreme Court of the United States, the 10th day of April, 1908.

[Seal S. C. Cal.]

W. H. BEATTY,
*Chief Justice of the Supreme Court
of the State of California.*

[Seal Supreme Court of California.]

Attest:

[SEAL.] F. L. CAUGHEY,
*Clerk of the Supreme Court
of the State of California,*
By R. L. DUNLAP,
Deputy Clerk of said Court.

Received a copy of the above citation, and a copy of the writ of error therein mentioned, in the city of Los Angeles, county of Los Angeles, state of California, this 10th day of April, 1908. Also copy of the assignments of error.

LESLIE R. HEWITT,
J. R. SCOTT,
H. T. LEE, AND
W. B. MATHEWS,
*Attorneys for the City of Los Angeles,
Defendant in Error in said Writ.*

Filed the 10th day of April, 1908.

F. L. CAUGHEY, *Clerk,*
By R. L. DUNLAP,
*Deputy Clerk of the Supreme Court
of the State of California.*

141 In the Supreme Court of the United States.

L. A. No. 1925.

LOS ANGELES FARMING AND MILLING COMPANY (a Corporation),
Plaintiff in Error,

vs.
THE CITY OF LOS ANGELES (a Municipal Corporation), Defendant
in Error.

To the Clerk of the Supreme Court:

In the above entitled case the Plaintiff in error will rely upon the assignments of error filed in the said case on the 10th day of April 1908, and shown in the record filed in said case in your office; and Counsel for Plaintiff in error, and for Defendant in error, request you to print the entire record in said case (except that at the further request of the Counsel for Plaintiff in error the Map Ex. A. or any part thereof may be omitted) and said record when so printed shall be used upon the hearing to determine the case upon its merits as provided in Rule 10 #9, of said Court.

R. M. WIDNEY,
Counsel for Plaintiff in Error.
LESLIE R. HEWITT,
J. R. SCOTT,
H. T. LEE,
W. B. MATHEWS,
Counsel for Defendant in Error.

142 [Endorsed:] U. S. Supreme Court L. A. Farming and Milling Co. P'tff in Error *vs.* Los Angeles City, Def't in Error. Stipulation for printing the Record. Office of the Clerk Supreme Court U. S. Received Apr. 21, 1908.

143 [Endorsed:] File No. 21,127. Supreme Court U. S. October Term, 1907. Term No. 724. Los Angeles Farming & Milling Co., Plff in Error, *vs.* The City of Los Angeles. Stipulation as to printing of record. Filed April 21st, 1908.

Endorsed on cover: File No. 21,127. California supreme court Term No. 724. Los Angeles Farming and Milling Company, plaintiff in error, *vs.* The City of Los Angeles. Filed April 21st, 1908. File No. 21,127.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 137.

**Los Angeles Farming and Milling
Company,**

Plaintiff in Error,

vs.

The City of Los Angeles,

Defendant in Error.

BRIEF FOR THE CITY OF LOS ANGELES.

LESLIE R. HEWITT,

W. B. MATHEWS,

Attorneys for Defendant in Error.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 137.

**Los Angeles Farming and Milling
Company,**

Plaintiff in Error,

vs.

The City of Los Angeles,

Defendant in Error.

BRIEF FOR THE CITY OF LOS ANGELES.

- *If the Court Please:*

This case comes before the court on writ of error to review a judgment of the Supreme Court of the state of California, affirming a judgment of the Superior Court of the county of Los Angeles, in that state, in a suit brought by the City of Los Angeles, against the plaintiff in error to quiet title in the city to a certain water right in the Los Angeles river.

STATEMENT OF THE CASE.

Pleadings. The complaint and answer in the case before the state courts show substantially as follows: The complaint alleges, that the Los Angeles river is an unnavigable stream of water, located within the county of Los Angeles. It takes its rise in the San Fernando valley and in the surrounding mountains, and flows down for several miles to the northern boundary of the city of Los Angeles, and thence through said city to and across its southern boundary.

That said river consists of a surface stream, and an underground stream; that such underground stream extends throughout the whole of the lands of the plaintiff in error, described in complaint, and that all of the underground waters in said lands, from the surface of the ground down to bed rock, are part of said river. [Tr. fol. 6, pp. 1-2.]

That the City of Los Angeles is now, and, ever since its organization has been, the owner in fee simple of the paramount right to take and use all of the waters of said river, from its sources to the southern boundary of the city so far as necessary to give an ample supply of water for the use of the city and its inhabitants. [Tr. fols. 6-7, p. 2.]

That the plaintiff in error owns its land, subject to said paramount right of the city; that the plaintiff in error claims adversely to the city an estate or interest in said paramount right, and the right to divert from said river and use upon its lands all the surface and subterranean waters of said river at times when the city and its

inhabitants may need said water and be entitled to use the same. [Tr. fols. 7-8, pp. 2-3.]

That all the claims of the plaintiff in error are without right, and that it has no estate, right, title or interest in the waters of the river or in or to the use of same, save in subordination to the alleged paramount right of the city. [Tr. fol. 9, p. 3.]

The answer of the plaintiff in error alleges as follows:

It denies that said river flows down through the City of Los Angeles, or across its southern boundary, or that the city is the owner of the paramount right asserted by it, or that the alleged adverse claims of the plaintiff in error are without right, or that it has not any right or interest in the waters of the Los Angeles river, save in subordination to said paramount right claimed by the city. [Tr. fol. 11, p. 4.]

Further answering, the plaintiff in error alleges, that it and its predecessors in interest have been in the exclusive possession of its lands for over fifty years next prior to the commencement of this action, under claim of title, and during all of that time, said lands and the waters therein or thereon or riparian or appurtenant thereto, have been used for the ordinary use of the owners and occupants thereof. [Tr. fol. 12, p. 4.]

That the title to the lands and waters in controversy herein was first vested in the crown of Spain, that it passed to the republic of Mexico in 1822, upon the establishment of its independence, and that the republic of Mexico, on June 17, 1846, granted to the predecessors in interest of the plaintiff in error the Rancho Ex-Mission de San Fernando, including the lands of the plaintiff

in error. That by the treaty of Guadalupe Hidalgo, the sovereign rights and title of the republic of Mexico in said premises passed to and were vested in the United States subject to the obligation imposed by that treaty to respect and protect the rights of private property. [Tr. fols. 13-14, p. 5.]

That the act of Congress, entitled "An Act for the Admission of the State of California into the Union," approved Sept. 9, 1850, provided:

"That the said state of California is admitted into the union upon the express condition that the people of said state, through their legislature, or otherwise, shall never interfere with the primary disposal of the public lands within its limits and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned." [Tr. fol. 14, p. 5.]

That Congress, by an act approved March 3, 1851, provided for the ascertainment and settlement of private land claims in the state of California, and created a board of land commissioners for that purpose. [Tr. fols. 14-17; pp. 5-6.]

That the claim of the predecessors in interest of the plaintiff in error to the grant of lands from the Mexican republic was duly presented to said board of land commissioners and was confirmed, and thereafter, on January 8, 1873, a patent therefor was issued by the United States to said claimants, and by virtue of said grant, confirmation and patent, said patentees became vested with the title in fee simple to said lands and all the waters therein, or thereon, or riparian thereto. [Tr. fols. 17-18, p. 7.]

And the plaintiff in error, by its answer, pleads the order and decree of confirmation, and the patent to said lands as *res adjudicata*, and alleges that the city is estopped and barred thereby from setting up or maintaining any claim or interest in or to the premises described in said patent. [Tr. fols. 18-19, p. 7.]

That pursuant to the provisions of said act of March 3, 1851, the mayor and council of the city of Los Angeles presented to said board of land commissioners a claim for 16 square leagues of land claimed or known as the pueblo of Los Angeles, and for the water rights of said Los Angeles river for the use of the pueblo. That said claim was adjudged and confirmed to be valid to the extent of four square leagues, and, as to the remainder thereof, it was held to be invalid and void, and was rejected, and a patent was issued by the United States to the plaintiff, on August 9, 1866, for said 4 square leagues of land. [Tr. fol. 19, p. 7.]

And the plaintiff in error, by its answer, pleads the confirmation and patent in favor of the city for said four square leagues as *res adjudicata*, and asserts that the city is estopped and barred thereby from setting up or maintaining any claim, title, ownership or interest in or to the premises in controversy herein. [Tr. fol. 19, p. 8.]

That the city has no lands within its patented limits riparian to the Los Angeles river. [Tr. fol. 21; p. 8.]

Further answering, plaintiff in error alleges that the alleged tributaries and sources of the Los Angeles river are located on public lands of the United States, and that said waters have flowed upon and to the lands of the

plaintiff in error from time immemorial. [Tr. fols. 21-22; p. 8.]

That the legislature of the state of California, by various acts mentioned in the answer, to-wit: an act passed April 5, 1851, an act approved March 28, 1874, an act approved April 1, 1876, an act approved March 30, 1878, and an act approved January 31, 1889, attempted to grant or convey to the city of Los Angeles the ownership of the paramount right to take and use all the waters of the Los Angeles river for the uses and purposes claimed in the complaint, including all the waters of the Rancho Ex-Mission de San Fernando, and of the lands of the plaintiff in error, and of the public lands of the United States on which the tributaries and sources of said river are located. That all of said acts of the legislature are null and void, under the act of Congress admitting the state of California into the Union, and also under the constitution of the United States, prohibiting the taking of private property for public use except by due process of law and upon just compensation therefor. [Tr. fols. 22-23; pp. 8-9.]

Stipulation of Facts. The case was submitted to the trial court for decision upon a stipulation of facts, substantially to the following effect:

That, in the year 1781, the pueblo of Los Angeles was established on the present Los Angeles river (then known as the Porciuncula), by the governmental action of the authorities of the kingdom of Spain, and embraced 4 square leagues of land, now included in the present city of Los Angeles and embracing the lands afterwards patented to the city, under the provisions of the act of

Congress of March 3, 1851, that the settlers and inhabitants of the pueblo diverted water from the river, by means of ditches, for domestic and irrigation purposes, and that from time to time, as the pueblo increased in population, additional farming lands were put under irrigation, and sufficient water therefor was diverted within the pueblo limits from the river until, at the time of the acquisition of the state of California by the United States, the amount of such irrigable land was about fifteen hundred acres. [Tr. fols. 24-25; p. 10.]

That, under the laws of the kingdom of Spain, the pueblo, upon its foundation, by virtue of a grant under such laws, had the paramount right claimed by the plaintiff in the complaint herein, to use all of the water of the river, and such paramount right continued to exist under that government and under the Mexican government until the acquisition of California by the United States. [Tr. fols. 25-26; p. 10.]

That no grant or claim of the real property described in complaint was ever presented for confirmation under the act of March 3, 1851, except in so far as the same may have been embraced in the claim of the mayor and common council of the city of Los Angeles to 16 square leagues of land presented for confirmation to the board of land commissioners created and sitting under said act, resulting in the confirmation and patenting of 4 square leagues of said lands and the rejection of said claim as to the remainder thereof. [Tr. fols. 26-27; pp. 10-11.]

That, on April 4, 1850, an act of the legislature of the state of California was passed, providing for the incor-

poration of the city of Los Angeles with limits including four square miles, and declaring, in section 3, that "the corporation created by this act shall succeed to all rights, claims and powers of the pueblo de Los Angeles in regard to property, and shall be subject to all the liabilities incurred and obligations created by the ayuntamiento of said pueblo." [Tr. fols. 27-28; p. 11.]

That, on October 26th, 1852, the city filed a petition with the board of land commissioners for the confirmation of its title to its pueblo lands, which it claimed were sixteen square leagues in extent. The commissioners rendered a decision, holding that the city was entitled to said pueblo lands, but that they embraced only four square leagues, and the claim of the city to the other part of the alleged sixteen square leagues, was rejected. This decision was confirmed by the District Court of the United States, and, in accordance therewith, a patent of the United States was afterwards, on August 9, 1866, issued to the city for the four square leagues. [Tr. fols. 28-50; pp. 11-21.]

Afterwards, on August 4, 1875, another patent was issued by the United States to the city for said four square leagues of land, and being in the same form as the patent of August 9, 1866, except that no mention was made therein of the fact that the land for which confirmation was asked contained sixteen square leagues, or that the claim of the city was founded upon the Mexican grant to the petitioners made on the 25th day of August, 1844, as recited in the earlier patent; also, except that the patent of August 4, 1875, contained a certificate of the United States surveyor general for Cali-

fornia that notice of the plat and survey had been advertised in two newspapers, and also a certificate of said surveyor general that the plat had been published in two newspapers; also except that the plat of survey in the patent of 1875 contained a certificate of said surveyor general, dated June 19, 1874, that the plat was a correct copy of the original; and also contained an endorsement that the plat had been approved August 4, 1875, by the commissioner of the general land office. [Tr. fols. 50-51, pp. 21-22.]

That the Rancho Ex-Mission de San Fernando, which embraces the land claimed and owned by the plaintiff in error herein, was an imperfect or inchoate grant made by the Mexican government on June 14, 1846, and the claim thereto of the predecessors in interest of the plaintiff in error, under said grant, was presented to and confirmed by the board of land commissioners under the act of Congress of March 3, 1851, and a patent therefor, in the usual form, was issued by the United States on January 8, 1873. That said patent includes 121,619 acres of land, through a part of which the Los Angeles river and its tributaries flow, and said rancho is riparian to said river and said patent states that the United States of America grants the land therein embraced with the appurtenances, and without making any reservation or exception of any rights to said river or its sources or tributaries, or of the waters therein. [Tr. fols. 51-52; p. 22.]

That neither the city nor any of its predecessors have contested the grant, survey or proceedings in connection with the confirmation of the claim of the predecessors in

interest of the plaintiff in error to said rancho. That said rancho is situated on said river, some ten miles above the city of Los Angeles, and above any of the points of diversion of water by said city. [Tr. fol. 53; pp. 22-23.]

After the acquisition of California by the United States, the pueblo of Los Angeles continued to exist and to be managed by the pueblo authorities, and the water of said river continued to be used for domestic and irrigation purposes by its inhabitants until the incorporation of the city under said act of the legislature of April 4th, 1850, and thereafter the use of water from said river for municipal, domestic and irrigation purposes continued until about 1901, since when all of said water has been needed and used for domestic purposes in said city as enlarged from the patented area of 17,172 acres to 27,695 acres in 1898. [Tr. fols. 53-54; p. 23.]

That the surface stream of the Los Angeles river crosses the northern corporate boundary of the city, but does not reach the southern corporate boundary thereof in the dry season of the year, extending from June to November or December, except after an unusually heavy season of rainfall, but said stream would reach said southern corporate boundary if substantially all the waters were permitted to flow down past said northern corporate boundary.

That the surface stream of the river continues for a distance of several miles above the city, to points where it rises from beneath the surface of the ground, and, in seasons of heavy rainfall, it extends up to the mouths of the various canyons from which surface streams coming

from public lands of the United States, and which are the sources and tributaries of the Los Angeles river, emerge and flow, until the approach of summer, when they sink into the sand at or near the mouths of such canyons. [Tr. fols. 56-57; p. 24.]

That all of the territory in which the surface stream of the Los Angeles river constantly flows and all of the valleys through which the torrential surface stream of the river flows, in winter and spring, up to the mouths of said canyons, are embraced within Spanish and Mexican grants confirmed and patented to parties, other than the city, under the act of March 3, 1851. [Tr. fol. 57; p. 24.]

That the city has sold to private parties, all the lands embraced in its patent from the United States, including the lands riparian to the river, excepting certain lots on which are erected public city buildings, also certain parks and the river bed, 200 feet more or less in width inside the patent boundary. [Tr. fol. 58; p. 25.]

That the allegations of the complaint, describing the Los Angeles river, and showing that the underground stream thereof extends throughout the whole of the lands of the plaintiff in error, described in the complaint, are true. [Tr. fol. 58; p. 25.]

The cause having been submitted to the trial court for decision, that court made formal findings, deciding that all the allegations of the complaint are true, and gave judgment in favor of the city in accordance with the prayer of the complaint. [Tr. fols. 69-80; pp. 30-35.]

Plaintiff in error took an appeal to the Supreme Court

of the state of California and that court affirmed the judgment. [Tr. fols. 93-104; pp. 40-45.]

Assignment of Error. Plaintiff in error has submitted assignments of error, with reference to the decision of the Supreme Court of California, substantially to the following effect:

First: That the state court erred in deciding that the title to the water rights in controversy was not vested by the treaty of Guadalupe Hidalgo in the United States and in denying the rights of plaintiff in error to such property, which were derived and protected under that treaty. [Tr. fols. 121-122; pp. 52-53.]

Second: That the state court erred in deciding that the act of Congress entitled, "An Act to ascertain and settle private land claims in the state of California," approved March 3, 1851, did not confer jurisdiction of the property in controversy upon the board of land commissioners, and in deciding that the proceedings, decrees and patents in confirmation did not adjudicate and terminate the claim of the city to such property; that such decision is against the validity, force, and effect of that act. [Tr. fols. 122-123; p. 53.]

Third: That the state court erred in deciding that the patent from the United States to the lands of the plaintiff in error did not include the general common law riparian rights of the state of California and of the United States, which make the waters in, on and riparian to such lands part and parcel thereof, and pass to the patentee, with rights to the use of same, and in deciding that the patent from the United States to the city conveyed greater rights to the waters of the Los Angeles river than said

common law riparian rights, and subordinates or transfers riparian rights pertaining to the land of plaintiff in error to the city of Los Angeles; that such decision denied to plaintiff in error the equal protection of the laws, in violation of section 1, article XIV of the constitution of the United States. [Tr. fols. 124-125; p. 54.]

Fourth: That the state court erred in deciding that the patent from the United States to the predecessors in title of the plaintiff in error did not convey the legal title to the property in controversy as part and parcel of the land therein described, and in deciding that said patent was not conclusive of the legal title of the patentee to such land, including the waters in, on and riparian thereto. [Tr. fols. 125-126; p. 54.]

Fifth: That the state court erred in its decision, in that such decision interferes with the primary disposal of the public lands within the state of California. [Tr. fol. 126; pp. 54-55.]

Sixth: That the state court erred in deciding that various acts of the legislature of California, passed in 1851, 1874, 1876, 1878, and 1889, respectively, and purporting to convey to the city of Los Angeles the legal title to the property in controversy, effected such conveyance, and were valid; that said statutes are contrary to and in violation of the act of Congress admitting the state of California into the Union, the treaty of Guadalupe Hidalgo, the act of March 3, 1851, and section 1, article XIV of the constitution of the United States. [Tr. fols. 126-127; p. 55.]

Seventh: That the state court erred in deciding that the patent from the United States to the city of Los An-

geles, and the proceedings in confirmation resulting in the issuance of the same, were not conclusive against the city in respect to any right, title, interest or claim, derived from Spain or Mexico, in or to land lying outside of the premises described in the patent. [Tr. fols. 127-128; p. 55.]

Eighth: That the state court erred in deciding that the city of Los Angeles is the owner in fee simple of the water right asserted in its complaint, and that such right was not limited to the original pueblo limits, but extends as well to all future additions of land to the city; that such decision is contrary to the validity, force, and effect of acts of Congress, and decrees and patents thereunder, and of section 1, article XIV of the constitution of the United States. [Tr. fols. 128-129; pp. 55-56.]

Ninth: That the state court erred in deciding that previous decisions of that court in cases to which the plaintiff in error was not a party, and in which its land was not included, were determinative of the prior and paramount right asserted by the city, whereas, said courts should have decided that the constitution and laws of the United States, and patents thereunder, and the pleadings and stipulation of facts in the state court, were alone determinative of the rights of the plaintiff in error; that such decision denies to the plaintiff in error the equal protection of the laws, and deprives it of property without due process of law, contrary to section 1, article XIV of the constitution of the United States. [Tr. fols. 129-130; p. 56.]

Tenth: That the state court erred in overruling objections of plaintiff in error to the admissibility of evi-

dence introduced to attack or vary the terms or effect of the patents issued by the United States to the predecessors in interest of plaintiff in error and to the city. [Tr. fol. 130; p. 56.]

ARGUMENT.

I.

This court has no jurisdiction of the writ of error, for the reason that the record does not show that a real and substantial Federal question was presented to the Supreme Court of the state of California for decision, or was actually decided, or that the decision of such a question was necessary to the determination of this cause.

The subject of this action is the alleged title of the City of Los Angeles to the paramount right to take and use all of the waters of the Los Angeles river, so far as may be necessary, from time to time, to supply the city and its inhabitants with water. The stipulation entered into by the parties at the trial in the state court established the fact that "under the laws of the kingdom of Spain, said pueblo upon its foundation by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the complaint herein, to use all the water of the river, and such paramount right continued to exist under that government and under the Mexican government, until the acquisition of California by the United States." The question, therefore, remained to be determined whether this water right, which was owned by the pueblo of Los Angeles until the cession

of California, passed from the pueblo to the city of Los Angeles and continues in the city as claimed in its complaint. The plaintiff in error, by its answer, denies this claim upon the following grounds:

- (a) That such water right, upon the cession of California, passed to and became vested in the United States;
- (b) That the title to such water right was not claimed by or confirmed to the city in the proceedings taken under the act of March 3, 1851, and, therefore, was lost to the city;
- (c) That such water right was "land" within the meaning of that word as employed in the act of March 3, 1851, and, therefore, was subject to the jurisdiction of the board of land commissioners created by that act;
- (d) That the confirmation, by decree and patent, of the Mexican grant, under which plaintiff in error claims, vested in the confirmees the title to the lands embraced in the grant free from the paramount water right which had been owned by the pueblo.

And, upon these alleged grounds, plaintiff in error claims that the decision of the state court was adverse to a right or title claimed under and protected by the treaty of Guadalupe Hidalgo and the act of March 3, 1851.

1. *We submit that the record does not show that the state court decided against any right, title, privilege or immunity claimed or asserted under or protected by the treaty of Guadalupe Hidalgo or the act of March 3, 1851.*

The provisions of the treaty, in reference to the rights of Mexican citizens, are contained in articles VIII and IX. Article VIII guaranteed the rights of ownership

of Mexicans who do not elect to become citizens of the United States, and their heirs and Mexican grantees. It does not appear that the plaintiff in error comes in this category. Article IX protected the rights of Mexicans who elected to become citizens of the United States, *only until California should have been admitted into the Union*, after which time, they became a part of the people of the state, with the same guarantees, and no other, that their fellow citizens enjoyed.

It appears from the stipulation of facts that, at the time the treaty was concluded, the title to the property in controversy was not vested in any Mexican citizen, but was vested in the pueblo of Los Angeles, and, at that time, the land of plaintiff in error was subject to the paramount water right which the city claims to own as the successor of the pueblo. The decision of the state court, therefore, took nothing from the land of plaintiff in error which it included under Mexican laws, and recognized no outstanding right or title which did not exist under those laws at the date of the treaty. We contend that the decision of the state court was correct because it preserved, for the benefit of the city, the same legal right respecting the waters of the Los Angeles river that its predecessor, the Mexican pueblo, possessed, at the date of the treaty. On the other hand, plaintiff in error complains of the decision, not because it gives plaintiff in error less than its Mexican predecessor had, but because it does not give more.

Our contention that the record shows no right or title of the plaintiff in error which is protected by the treaty of Guadalupe Hidalgo is amply supported by decisions

of this court. The case of City of New Orleans v. De Armas, 9 Peters, 223, was a writ of error to the Supreme Court of Louisiana in a suit which had been brought against the city of New Orleans to quiet title to a lot of land in that city. The plaintiffs in that suit asserted title derived from the Spanish government, which had been confirmed by the United States, while the city claimed the lot as being part of the land dedicated to the use of the city in the original plan of the town, and, therefore, not grantable by the king. The case was decided against the city in the state courts and was removed into this court under the 25th section of the Judicial Act. The appellees moved to dismiss the writ on the ground that the record did not show that the constitution or a treaty, or a law, of the United States had been violated by the judgment of the state court. In its opinion, the court says:

“To sustain the jurisdiction of the court in the case now under consideration, it must be shown that the title set up by the city of New Orleans is protected by the treaty ceding Louisiana to the United States, or by some act of congress applicable to that title. Counsel in support of the motion contends, and we think correctly, that the treaty does not embrace the case.”

The third article of the treaty contained provisions very similar to those of article IX of the treaty with Mexico, to-wit:

“The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and be admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities

of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

The court says:

"Had any one of these rights been violated while this stipulation remained in force, the individual supposing himself to be injured, might have brought his case into this court, under the 25th section of the Judicial Act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were 'admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.' The right to bring questions of title decided in a state court, before this tribunal, is not classed among these immunities. The inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state."

The court also says:

"The judgment of the state court appears on the record to have depended on, and certainly ought to have been determined on, the opinion entertained by that court of the legal rights of the parties under the crowns of France and Spain. The case involves no principle on which this court could take jurisdiction which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States. It would also comprehend all controversies concerning titles in any of the new states, since they are admitted into the Union by laws expressed in similar language."

In *Phillips v. Mound City Land and Water Association*, 124 U. S. 605, (31: 588), it was held, that the adjudication by the Supreme Court of California, that cer-

tain proceedings before a Mexican tribunal, prior to the treaty of Guadalupe Hidalgo, were insufficient to effect a partition of a tract of land, before that time granted by the Mexican government, which grant was confirmed under the act of March 3, 1851, presented no Federal question, and Mr. Chief Justice Waite, delivering the opinion of the court, said:

“Article VIII of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of the Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary tribunals. Any court, whether state or federal, having jurisdiction of the parties, and of the subject matter of the action, was free to act in premises.”

The doctrine announced in the last case was sustained in *California Powder Works v. Davis*, 151 U. S. 395, (38: 206), which arose in the state court. There the respective parties claimed under conflicting Mexican grants, both of which had been confirmed and patented. The state court found that one of the grants had been fraudulently antedated, and, accordingly, sustained the title asserted under the other grant. The unsuccessful party obtained a writ of error, removing the case to this court. The plaintiff in error contended that the decision of the state court in the cause was and is against a title and right claimed under the treaty of Guadalupe Hidalgo

and the act of March 3, 1851. On motion to dismiss for want of jurisdiction, this court, speaking by Mr. *Chief Justice Fuller*, said:

“The judgment rested upon the proposition that the grant under which the plaintiff in error deaigned title was simulated, and this was a ground sufficient to sustain it, involving no federal question. The parties claimed under separate private land claims, originating, as alleged, under the republic of Mexico, and separately confirmed, surveyed, and patented by the authorized officers of the United States.”

The court also said:

“The state courts were open for the determination between individuals of the priority or validity of conflicting titles under different grants from the same antecedent source, and the issue as to whether one of the two grants was forged or obtained by fraud did not involve the denial of a right or title set up under the treaty or the statute.”

The case of Crystal Springs Land and Water Co. *et al.* v. City of Los Angeles, 82 Fed. 114, was a suit to quiet title, brought in the Circuit Court of the United States, and involving the water of the Los Angeles river, which flowed through lands of the complainants. These lands were included in Mexican and Spanish grants, which had been confirmed under the act of March 3, 1851. It was claimed by the complainants that the waters percolating in their lands passed with the grants and became the property of the owners of the lands; that the rights of the complainants were derived under the grants made by the Spanish and Mexican governments, and confirmation thereof by the United States, and that they were protected by the treaty between the United States

and Mexico. The complainants also alleged that the city claimed to own the water as part of the Los Angeles river under the Spanish and Mexican laws, as successor of the Mexican pueblo, and by virtue of the grants contained in the acts of the legislature referred to in the record of this case. [Tr. fols. 22-23, pp. 8-9.] The city answered disclaiming any rights in the waters of the river under these acts as against complainants, thus leaving the controversy as to the rights of the parties to be determined by reference to the laws of Spain and Mexico, and the city moved to dismiss the bill for want of jurisdiction. Upon the question, "Does the suit arise under the treaty of Guadalupe Hidalgo?" the Circuit Court declared:

"Where the parties claim under Spanish or Mexican grants, confirmed and patented by the United States, and the controversy is only as to what were the rights acquired by the parties, respectively, or their predecessors in interest, under the Spanish or Mexican governments, it being conceded that the rights so acquired, whatever they may have been, were included in the confirmation and quitclaimed through the patent of the United States, federal jurisdiction does not exist; and it is immaterial whether such rights were acquired through the original grants or transactions subsequent thereto.

* * * The matter in dispute is whether or not the waters percolating under said lands passed with the original grants thereof, and the determination of this question does not require a construction of the constitution or any treaty or statute of the United States, but depends upon the laws of Spain and Mexico."

The Circuit Court dismissed the bill for want of jurisdiction, and, upon appeal to this court, the decree was affirmed (*Crystal Springs Land and Water Co. v. Los*

Angeles, 177 U. S. 169) on authority of *Phillips v. Mound City Assn.*, 124 U. S. 605; *Cal. Powder Works v. Davis*, 151 U. S. 389, 395; *New Orleans v. DeArmas*, 9 Pet. 224; and other decisions cited in the opinion of this court.

The case of the City of Los Angeles v. Pomeroy and Hooker, *supra*, went to the Supreme Court of the United States on writ of error, and the decision by that court was reported under the title of *Hooker v. Los Angeles*, in 188 U. S. 314 (47 L. Ed. 487). The defendants in that case, who were plaintiffs in error in the Supreme Court of the United States, were situated exactly similarly to the plaintiff in error in this case, being the owners of lands through which the Los Angeles river flows, and embraced in ranchos derived under Spanish and Mexican grants, which had been confirmed and patented to their predecessors in interest under the act of March 3, 1851, and the controversy involved the very same question that is involved here, namely: whether the city of Los Angeles was the owner of the paramount right to take and use the waters of the river to the extent of its needs. The defendants in that case disputed the city's claim to such right and relied upon the decrees and patents made under said act, confirming titles to their land, and upon the provisions of the treaty of Guadalupe Hidalgo. Upon this point, the Supreme Court said:

“The validity of that act was not drawn in question in the state court, and as the right or title asserted by plaintiffs in error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error

to the waters of the river *was not against any title or right claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the constitution.* If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not involve the construction of the treaty, *but the validity of the title of Mexican and Spanish grants prior to the treaty."*

We, therefore, submit that no Federal question exists in the record by virtue of any provision of the treaty of Guadalupe Hidalgo or of the act of March 3, 1851.

2. *The question of the existence of the paramount water right claimed by the city was one of state or general public law, on which the decision of the state court was final and conclusive.*

The right claimed by the city is in the nature of a natural right, that is one created by general law, as distinguished from rights gained by grant or prescription. It had its origin in the civil law, which prevailed in the Californias under Spanish and Mexican rule. Under the operation of that law, this water right was incident to the existence of the pueblo. The pueblo did not cease to exist upon the conquest of Mexico, neither were the municipal laws of the conquered territory abrogated by the conquest and change of sovereignty, but continued in force, except in so far as they are repugnant to the paramount laws of the new sovereign, or have been changed by the legislature. It, therefore, devolved upon the state court to determine, from a consideration of the general laws of California, whether the water right possessed by the Mexican pueblo, at the date of the treaty, had passed

to and become vested in its successor, the City of Los Angeles. Counsel for plaintiff in error contend that the "legal title (to the property in controversy) necessarily vested by the treaty in the United States." This contention is based upon the idea entertained by counsel that, with the change of flags, all Mexican laws ceased to exist in California, and that the pueblo was divested of its water right in favor of the United States. This view is erroneous. In the case of Ohm v. San Francisco, 92 Cal. 437, 450, it was declared:

"We understand that our legal tribunals, in adjudicating upon rights originating under and depending upon the laws of Spain and Mexico in force in California prior to the conquest, take judicial notice of such laws in the same manner and to the same extent that they take notice of the common law of England as a part of our own municipal law. The municipal laws of a conquered territory do not cease to exist by reason of the conquest and change of sovereignty, but continue in force, so far as they are not repugnant to the paramount laws of the new sovereign, until changed by the legislature. This results from the absolute necessity of preserving the rules by which private rights are governed. Such laws, therefore, become and remain, until repealed or altered, the municipal law of the new sovereignty, which its courts are bound to notice and to enforce. Upon the same principle and with the same necessity it results that, so far as private and vested rights of the inhabitants of the conquered territory are dependent upon the exercise of official power by the functionaries of the former government, the rules defining such power must be noticed in the same way. For such purposes they are not to be treated as foreign laws, and alleged and proven as facts. (Fremont v. United States, 17 How. 537.)"

In the case of *Chicago and Pacific Railway v. McGlinn*, 114 U. S. 542, 546, this court said:

“It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. (*American Insurance Co. v. Canter*, 1 Pet. 542; *Halleck International Law*, Ch. 34, Sec. 14.)”

Since then the water right in question was derived under the general or municipal laws of Spain and Mexico, and these laws remain in force in the ceded territory, except in so far as they have been changed or abrogated by the new government, the question before the state court was, as stated in its opinion, "whether, under the general law of the locality, the old pueblo of Los Angeles, and the respondent herein, as its successor, had and have, as against appellant, the prior and paramount ownership of the use of so much of the water of the Los Angeles river as is necessary for its inhabitants and for general municipal purposes." The state court, in its opinion, reviewed former decisions of that court upon the subject of water rights in California, both before and since the conquest, in two of which decisions, namely, *Vernon Irrigation Co. v. The City of Los Angeles*, 106 Cal. 237, and *The City of Los Angeles v. Pomeroy*, 124 Cal. 597, the question of the city's title to the waters of the Los Angeles river was specifically involved, and the court, upon the authority of these earlier decisions, held that, under "the general law of the locality," the city was entitled to the prior and paramount right which it claimed. It was not necessary to that decision to construe any provision of the constitution, or a law or treaty of the United States. It was essentially a local question, to be determined by the state tribunals upon a consideration of local laws, and from the decision thereon no appeal will lie to this court. This proposition is thoroughly established by decisions of this court in cases involving questions of water rights in various states.

The case of the City of St. Louis against Myers, 113 U. S. 566 (28 L. Ed., p. 113), was brought to the Supreme Court of the United States on writ of error to the Supreme Court of the state of Missouri, and involved the question of riparian rights on the Mississippi river. The Supreme Court of the United States said:

"We are unable to discover that any federal right was denied by the decision which has been rendered. The act of congress providing for the admission of Missouri into the Union, March 6, 1820 (Ch. 22, 3 Stat. at L. 545), and which declares that the Mississippi river shall be 'a common highway and forever free,' has been referred to in the argument here, *but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of state law.*"

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; *but whatever incidents or rights attached to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.*

"As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream."

Packer v. Bird, 137 U. S. 661 (34 L. Ed. 816).

Hardin v. Jordan, 140 U. S. 371 (35 L. Ed. 428) was a case from Illinois, and involved the question as to the effect of the title granted by the United States to a tract of land along a small lake in respect to the bed of the

lake in front of the land actually described in the grant, and the court in that case quotes with approval from the decision of the Supreme Court of Illinois in Middleton v. Pritchard, 4 Ill. 510, as follows:

“The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation shall be given to or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; *but these are left to the principles of law and rules adopted by each local government where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grants.*”

This court then says:

“These views are referred to with strong approval by Chancellor Kent in a note to the third volume of his Commentaries, p. 427, 6th Ed., being the last edition prepared under his supervision.

“We do not think it necessary to discuss the point further. *In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.* The next question for consideration, therefore, is what is the law of Illinois with regard to such grants, etc.?”

In Shively v. Bowlby, 152 U. S. 1 (38 L. Ed. 331), the Supreme Court of the United States had to deal with a conflict as to the title in certain lands below high-water mark in the Columbia river, in the state of Oregon, between parties claiming respectively under the United States and under the state of Oregon. The entire subject was thoroughly examined, involving a re-

view of all the cases, both state and federal, and one of the conclusions reached was thus stated by Mr. Justice Gray:

“Grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the *sovereign control of each state*, subject only to the rights vested by the constitution of the United States.”

In the case of *Eldridge v. Trezevant*, 160 U. S. 452 (40 L. Ed. 490), the Supreme Court of the United States, after examination of many cases upon the subject, including *Barney v. Keokuk*, 94 U. S. 324 (24 L. Ed. 224), *Packer v. Bird*, *supra*, *Hardin v. Jordan*, *supra*, and *Shively v. Bowlby*, *supra*, states,

“These decisions not only dispose of the proposition that the lands situated within a state, but whose title is derived from the United States, are entitled to be exempted from local regulations, admitted to be applicable to lands held by grant from the state, but also of the other proposition, that the provisions of the fourteenth amendment extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a state to be valid under the constitution and laws of such state.

“The subject-matter of such rights and regulations falls within the control of the states, and the provisions of the fourteenth amendment to the constitution of the United States are satisfied if, in cases like the present one, the state law, with its benefits and its obligations, is impartially administered.”

In the case of *Hooker v. Los Angeles*, *supra*, in which, as we have stated above, the plaintiffs in error were in the same situation as the plaintiff in error in this case, being owners of lands through which the Los Angeles river flows and embraced in Spanish and Mexican grants which had been confirmed and patented under the act of March 3, 1851, and the controversy involved the question of the city's rights in the Los Angeles river and the effect of such confirmation and patents, the court stated:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco v. Scott*, 111 U. S. 768, 28 L. Ed. 593, and 4 Sup. Ct. Rep. 688; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. Ed. 206, 14 Sup. Ct. Rep. 350. And the question of the existence of percolating water was merely a question of fact."

"The patents were in the nature of a quit-claim, and under the act of March 3, 1851 (Sec. 15), were 'conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.' The validity of that act was not drawn in question in the state court, and as the right or title asserted by plaintiffs in error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error to the waters of the river *was not against any title or right claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the constitution.*"

The case of *Devine v. Los Angeles*, 202 U. S. 313, also involved the question of the city's title to the waters of the Los Angeles river. The complainants in that case

owned various tracts of land located in the county of Los Angeles, in ranchos San Rafael, Los Felis and Providencia, which were Spanish and Mexican grants. The titles were confirmed to the successors of the original grantees under the act of March 3, 1851, and patents were thereupon issued by the United States to the confirmees. It was alleged by the complainants that these grants conveyed the title to the waters within them; and that the Los Angeles river runs through the three ranchos and thence to the city. It was further alleged that the city of Los Angeles claimed to be the successor in right and title to all of the lands granted by the Spanish and Mexican governments to the Pueblo de Los Angeles, that the city filed a claim before the land commissioners to 16 square leagues of land, alleging that the said lands had been granted to the pueblo; that the board confirmed the title of the city to four square leagues of land, but rejected its claim to the remaining twelve square leagues, and that a patent was issued to the city by the United States for the land so confirmed and that said patent did not refer to the river or its tributary waters, and did not purport to convey any of the waters of said river. It was also alleged that the city never procured a confirmation of any rights in the waters of the Los Angeles river other than those that passed under the grant of land covered by the patent. The Supreme Court of the United States declared that,

“The questions as to the nature and extent of complainant’s titles or rights, as put forward in the bill, are not federal questions, but questions of state or general law.”

The court then cites the decision in *Hooker v. Los Angeles*, *supra*, and quotes with approval the declaration made in that case, that

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final."

We, therefore, submit, that, since the state court based its decision on the general law of the state relating to pueblo water rights, and this court has laid down the rule that United States patents to lands bounded on streams are to be construed, as to their effect, according to the law of the state in which the lands lie, and has declared in *Hooker v. Los Angeles*, *supra*, and *Devine v. Los Angeles*, *supra*, specially involving the water right in controversy, that the question as to the title and rights of owners of land, held under confirmed and patented Spanish and Mexican grants, was one of state law and of general public law, on which the decision of the state court was final, it cannot be said that the decision of the Supreme Court of California in this case created a Federal question calling for adjudication by this court.

3. *The decision of a Federal question was not necessary to the determination of this cause in the state court.*

As shown above, the question as to whether the city owned the prior and paramount water right which it claimed, and could maintain it against the plaintiff in error, through whose lands the river runs, was strictly a question of state or general public law. The state court so regarded it, and rendered its decision in accordance

with its conception of the effect of that law. It held that since, under the laws of Mexico, the pueblo owned this water right at the time of the cession of California, its successor, the city of Los Angeles, continues to own it. Whether that view was correct or not, it is not for this court to inquire. It was broad enough in itself to support the final judgment, without reference to the question as to the meaning of the word "land" in the Act of March 3, 1851. Furthermore, this court has, by repeated decisions, excluded from Federal jurisdiction questions as to the incidents or rights attached to the ownership of lands situated in the various states, even though the title to the lands is derived under United States patents, thus establishing the rule that courts are not to look to the acts of Congress, under which the patents have been issued, for the purpose of determining these questions. The state court very properly said:

"The city was no more called upon to set up its water rights as successor to the pueblo than were appellant's predecessors called upon to set up the riparian rights of the owners of the land claimed by them."

On April 13, 1850, an act was passed by the legislature of California declaring:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of the state of California, shall be the rule of decisions in all courts of said state." (Stats. of Cal. 1851, p. 219.)

By the earlier act of the legislature of California of April 4, 1850, set up in the record, incorporating the

City of Los Angeles, it was provided that the city should succeed "to all the rights, claims and powers of the Pueblo de Los Angeles in regard to property."

So that, at the time proceedings were taken and patents were issued for the confirmation of the title to the lands of the pueblo and the rancho embracing the lands of plaintiff in error, the general law of California, with respect to water rights in unnavigable streams, was the common law, borrowed from England, and extended by judicial construction, except as to the rights of the City of Los Angeles in the waters of the Los Angeles river, and, as to these rights, it preserved and continued the rule of the civil law, borrowed from Spain and Mexico, respecting the water rights of pueblos located on streams. It will hardly be contended, indeed there is no ground for the contention, that a claimant of a Mexican or Spanish grant located on a stream in California, in order to retain the common law right secured by state legislation to receive upon his land the flow of a stream, without material diminution by an upper riparian owner, was obliged specially to present his claim to such right before the land commissioners, and have it confirmed and patented. Even if the titles to the lands on the river above the city, including the lands of plaintiff in error, had been derived under ordinary grants from the United States as owner, the question as to the nature and extent of the water rights of the various patentees, or their grantees, would depend not upon any supposed adjudication contained in the patents, but upon the law of the state. All of which goes to show that the decision of a Federal question was not necessary to the determination

of water rights in the Los Angeles river, and, being unnecessary, the rejection by the state court of the claim of plaintiff in error that, by virtue of the patents and proceedings in confirmation, its water rights are not subject to the rights claimed by the city, did not make a question for review by this court.

In the case of *Eustis v. Bolles*, 150 U. S. 361 (37:1111), it was declared:

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, *but that its decision was necessary to the determination of the cause*, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock v. Memphis*, 87 U. S., 20 Wall 590 (22:429); *Cook County v. Calumet & C. Canal & D. Co.*, 138 U. S. 635 (34:1110).

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

See also:

New Orleans v. New Orleans Water Works Co.,

142 U. S. 79 (35:943);

California Powder Works v. Davis, 151 U. S. 389 (38:206);

Dower v. Richards, 151 U. S. 658 (38:305);

Wade v. Lawder, 165 U. S. 624 (41:851).

4. *Federal jurisdiction cannot be founded upon questions which are frivolous and unsubstantial, or have been foreclosed by previous decisions of this court.*

Is it any longer an open question whether the rights of riparian owners, whose lands have been acquired under ordinary United States patents, are to be settled according to the principles of the local law, instead of according to any supposed adjudication in the patents? Certainly not, when we consider *St. Louis v. Myers, supra*; *Packer v. Bird, supra*; *Hardin v. Jordan, supra*; *Shively v. Bowlby, supra*, and other decisions of this court to the same effect.

Is it any longer an open question whether the water right claimed by the city, as successor to the Mexican pueblo, is to be determined by the state court according to the principles of the state law, instead of according to any supposed adjudication in the decrees or patents of confirmation? Certainly not, when we consider *Crystal Springs Land and Water Co. v. Los Angeles, 177 U. S. 169 (44:720)*; *Hooker v. Los Angeles, supra*, and *Devine v. Los Angeles, supra*; in each of which cases the right of the city was controverted by the owners of land bounded on the Los Angeles river, and claimed under confirmed and patented Mexican or Spanish grants, and it was explicitly decided that no Federal question existed.

We submit, therefore, that the questions upon which the jurisdiction of this court is invoked, have been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause such ques-

tions to be devoid of any substantial foundation or merit. This point is settled in:

Leonard v. Vicksburg S. and P. R. Co., 198 U. S. 416 (49:1108);

Equitable Life Assurance Society of the United States v. Brown, 187 U. S. 308 (47:190).

“A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgment of state courts.”

Hamblin v. Western Land Co., 147 U. S. 531 (37:267).

“The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation; there must be at least color of ground for such averment; otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.”

New Orleans v. New Orleans Waterworks Co., 142 U. S. 79 (35:943);

McCain v. Des Moines, 174 U. S. 168 (43:396).

“In our opinion the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our well considered judgments in similar cases.”

Spies v. Illinois, 123 U. S. 131.

First, Second, Third and Fourth Assignments of Error.

In the foregoing consideration of the question of Federal jurisdiction, we have fully covered, though indi-

rectly, the points embraced in the first, second, third and fourth assignments of error, to-wit: that the judgment of the state court was against rights claimed under and protected by the treaty of Guadalupe Hidalgo and the Act of Congress, approved March 3, 1851. We have clearly shown that the water right in controversy was derived under a Spanish grant prior to the treaty. This fact was not in dispute before the state court, as appears from the stipulation of facts upon which the case was tried and determined, wherein it was agreed that,

"Under the laws of the Kingdom of Spain said pueblo (of Los Angeles) upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the present case, to use all the water of the river, and such paramount right continued to exist under that government, and the Mexican government, until the acquisition of California by the United States." [Tr. fols. 25-26, p. 10.]

We have also shown that the municipal law, under which this right arose, has, so far as necessary to preserve such right in favor of the successor of the old pueblo, been continued in force under the new sovereignty, and that the interpretation and enforcement of this right belongs exclusively within the jurisdiction of the local tribunals.

Furthermore, as we have heretofore pointed out, the title to the land of plaintiff in error was derived under a Mexican grant, and not under the treaty with Mexico or the act of March 3, 1851, but, even though it were claimed under the treaty or that act, or even though the patent confirming the same should be deemed to be a

grant, still, the rule laid down by this court would apply —that is to say:

“Whatever incidents or rights attached to the ownership of property conveyed by the government will be determined by the state.”

City of St. Louis v. Myers, 113 U. S. 566, and other cases above cited.

5. *The claim in the fifth assignment of error that the decision of the state court denied to the plaintiff in error the equal protection of the law, in violation of the Fourteenth Amendment, is without merit and cannot confer Federal jurisdiction.*

The contention made by plaintiff in error in this assignment is subject to “the rule ordinarily applicable to the afterthoughts of counsel,” mentioned in *Caldwell v. Texas, 137 U. S. 692*, as the record does not show that plaintiff invoked in the state courts the provision of the Fourteenth Amendment forbidding any state to deny to any person the equal protection of the laws. The only grounds of defense set up in the answer of plaintiff in error were, that the allegations of the complaint were untrue, that its property rights were protected by the treaty of Guadalupe Hidalgo, that the act of September 9, 1850, admitting California to the Union, prohibited any interference by the state with “the primary disposal” of the public lands, that the grant including the lands of the plaintiff in error had been confirmed under the act of March 3, 1851, and a patent issued thereon, which contained no restriction or limitation as claimed by the city, that in the proceedings for the confirmation of the city’s title to its pueblo lands no application was made by the

city for confirmation of the water right which it asserts, that this action is barred by the statute of limitation and that certain acts of the state legislature, to amend the charter of the city and purporting to convey to the city a paramount water right in the river, are "null and void under said act of Congress admitting the state of California into the Union, and are also void under the constitution of the United States, prohibiting private property from being taken for public use, except by due process of law and upon just compensation paid. [Tr. fols. 11-24, pp. 4-9.]

It does not appear what particular provision of the Federal Constitution is referred to in the last named defense, but the language employed would indicate that it was the Fifth Amendment. That amendment, however, is a restriction on Federal power, and not on the power of the states, and the averment of its violation creates no real Federal question. *Winous Point Shooting Club v. Caspersen*, 193 U. S. 189 (48:675).

The record in this case contains the objections and exceptions of plaintiff in error, as defendant in the trial court, to the introduction, in evidence, of any of the matters set out in the stipulation of facts, upon certain grounds, designed evidently to raise Federal questions [Tr. fols. 60-67, pp. 26-29], which may be briefly epitomized as follows: That the admission of such evidence "would be in violation of the Federal laws and constitution set out in defendant's answer herein"; that such evidence and any claim thereunder was limited exclusively to the jurisdiction of the board of commissioners, acting under the Act of March 3, 1851; that such evidence was

“inadmissible to vary, modify, contradict, or in any manner impeach or modify the decrees or patents made under the provisions of that act,” or to call in question, or impair or impeach said act,” or to impair or impeach the primary disposal of public land, as provided in the Act of September 9, 1850, admitting California into the Union; “that said statutes of California (none of which is specified or indicated in the objections) are null and void and in violation of the Constitution of the United States and of said acts of Congress (referring presumably to the acts of the legislature and acts of Congress mentioned in the answer); that admission in evidence of said ordinances (impossible to tell what ordinances are referred to as the record contains, or refers to, no ordinance whatever) and proceedings of the City of Los Angeles was irrelevant, etc., and would be and is in violation of said Federal laws and constitution.”

It thus appears that there is nothing in the pleadings or proceedings in the trial court which was sufficient to raise or create a Federal question under the “equal protection” clause of the Constitution of the United States.

The Supreme Court of the state disposed of this case under prior decisions of that court which it held were “determinative of the prior and paramount right of the pueblo, and the plaintiff its successor, to the use of the water of the river necessary for its inhabitants and for ordinary municipal purposes.” The decision of the court does not deal with the question of the denial to plaintiff in error by the state of the equal protection of the law, and the record does not show that this question was raised in that court, or was necessary to the determina-

tion of the cause by that court, or that the court was aware that plaintiff in error claimed protection under the "equal protection" clause of the constitution." In fact, this question is raised for the first time in the assignments of error, which is too late for the purposes of this appeal.

"To give jurisdiction to this court, the title, right, privilege, or immunity, relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it; whereas, in this case, the question was not suggested until after judgment and after an application for rehearing had been overruled."

Duncan v. State of Missouri, 152 U. S. 377
(38:485);

Miller v. Texas, 153 U. S. 535 (38:813);

Morrison v. Watson, 154 U. S. 111 (38:927).

"The right on which the party relied must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed."

White v. Thompson, 66 U. S. 518 (17:65);

Maxwell v. Newbold, 59 U. S. 511 (15:508);

Hooker v. Los Angeles, 188 U. S. 314 (47:487).

It is the settled construction of this court that to bring any case within the reach of section 709, Revised Statutes,

"It must appear upon the face of the record of the state court, either by express terms, or by clear and necessary intendment, that the question did actually arise in the state court, not that it might have arisen or have been applicable to the case; and that the question was actually decided, not that it might

have been decided by the state court against the title, right or privilege, or exemption set up by the party."

Ocean Insurance Company v. William Polleys, 13 Pet. 157, 162.

"The court must be able to see clearly from the whole record that a certain provision of the Constitution or act of congress was relied on by the party who brings the writ of error, and *that the right thus claimed by him was denied.*"

Bridge Proprietors v. Hoboken Company, 1 Wall. 116, 143.

According to the argument of plaintiff in error, the purpose of the fifth assignment of error was to bring under review in this court a question involving only the construction of a state law. On page 56 of his brief, counsel, referring to this assignment, says: "In this assignment of error the single question is, what is the common law in California in regard to the fresh water stream in, on, and riparian to, the land of the plaintiff in error?" It is evident, therefore, that the thing complained of by the plaintiff in error, under this specification, is, not that the state court decided erroneously a Federal question, but that it decided erroneously a question arising under a state law. Such a decision is not subject to review by this court, for, as has been frequently decided, by this court, it cannot take jurisdiction of an appeal on writ of error to a state court on the ground that the latter committed error in construing or declaring a law of the state, and thereby deprived the unsuccessful party of his property, without due process of law, or denied him the equal protection of the laws,

within the fourteenth amendment of the Constitution of the United States.

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law within the fourteenth amendment of the Constitution of the United States."

Central Land Co. v. Laidley, 159 U. S. 103 (40:91).

In Moreley v. Lake Shore and Michigan Southern R. Co., 146 U. S. 162 (36:925), this court said:

"Nor are we authorized by the judiciary act to review this judgment of the state court, because this judgment refused to give effect to a valid contract, or because such judgment, in its effect impairs the obligation of a contract. If we did, every case decided in the state courts could be brought here, when the party setting up the contract alleged that the court took a different view of its obligation from that which he held."

"This court cannot reverse the decisions of state courts in regard to matters of general justice and equitable considerations in the taking of property."

Hooker v. Los Angeles, 188 U. S. 314 (47:487).

"The decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

Sayward v. Denny, 158 U. S. 180 (39:94).

"The decision of state courts as to what are the laws of the state is binding upon the courts of the United States."

Leeper v. State of Texas, 139 U. S. 462 (35:225).

The claim of plaintiff in error that the judgment of the state court denied to it the equal protection of the laws is without merit, and, in any event, presents no substantial Federal question. This claim, if it had been properly raised for the purpose of a writ of error from this court, which, as we have shown, is not the case, would present the question whether the state law applicable to this controversy treats plaintiff in error differently from what it does others in the same situation. Plaintiff in error does not specify wherein the state law, or its construction by the state court, deprived it of the equal protection of the law. It is not asserted that the state law has not been, or would not be, applied in the same way to any other person in the state of California under similar circumstances and conditions. It is not made to appear, in any way, that the law of the state under which the city asserts its claim to a prior and paramount right in the waters of the Los Angeles river as against the lands of plaintiff in error, is not equally applicable to other lands on the river situated similarly to those of the plaintiff in error. It does appear from the record in this case, that the state court, in adjudicating this controversy, relied upon and followed prior decisions of that court, in one of which, to-wit., Lux v. Haggan, 69 Cal. 255, the general question of pueblo water rights in California was considered and determined, and in another of which, to-wit, City of Los Angeles v. Pomeroy, 124 Cal. 597, the same question as is here involved existed as between the city and owners of land similarly situated to the lands of the plaintiff in error, and was decided in the same way. So that the record in

this case shows, not only that the general law of the state on which the city relied for the establishment of its claim against plaintiff in error, was a law equally applicable to the lands of all persons situated similarly to those of plaintiff in error, but that the Supreme Court of California, in construing and enforcing that law, has applied it to other persons in the state of California under circumstances and conditions similar to those in this case. Hence, we assert that the claim of plaintiff in error, that the judgment of the state court denied it the equal protection of the law, is not supported by any specification of discrimination in the record of the case, or in the assignments of error, nor by the history of adjudication in the state courts upon similar questions. Under these circumstances, the contention of plaintiff in error is without merit, and presents no real and substantial Federal question.

This court, in the case of *Eldridge v. Trezevant*, 160 U. S. 452 (40:490), held that, where a non-resident has received the same measure of right, in respect to his property in a state, as that awarded to its citizens, it cannot be said that he has been deprived of his property without due process of law, or been denied equal protection of the law, within the fourteenth amendment.

In the case of *Tinsley v. Anderson*, 171 U. S. 101 (43:91), this court held, that where it appeared that the same law or course of procedure, which was applied to a defendant in a criminal prosecution in a state court, would have been applied to any other person in the state under similar circumstances and conditions, his right to the equal protection of the law was not denied.

"A general statement that the decision of a court is against the constitutional rights of the objecting party or against the fourteenth amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question even where the judgment is a final one within the section of the Revised Statutes above mentioned. There must be at least some color of a Federal question. Hamblin v. Western Land Co., 147 U. S. 531 (37:267)."

Clarke v. McDade, 165 U. S. 168 (41:673).

"In order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up."

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336 (46:936).

"Where by the record it appears that, although a claim of a Federal question has been plainly made, if it also appears that it lacks all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction."

New Orleans Waterworks Co. v. Louisiana,
supra.

In this case, the claim of the particular constitutional right now under consideration not only lacks all color

of merit, but was not asserted in the state court, nor passed upon or necessarily involved in the judgment of that court.

6. *The claim of plaintiff in error, in the sixth assignment of error, that the state court erred in deciding that the patent from the United States to its predecessors in interest did not convey the legal title to the water right in controversy as part of its land presents no Federal question.*

This specification suggests no Federal question. In the first place, the controversy in the state courts did not involve the question whether the plaintiff in error was the owner of such prior water right, but whether the city was the owner of the same, so as to subject or subordinate the riparian rights appurtenant to the lands of plaintiff in error to such prior right. With the judgment in favor of plaintiff in error, the claim of the city would be dissipated, and, so far as its rights are concerned, plaintiff in error would have a full riparian right. Again, this specification, evidently, is based upon the notion that the predecessors in interest of plaintiff in error derived title to their lands, not from Mexico, but from the United States. That there is no ground for this view is apparent, not only from the manifest purpose and language of the Act of March 3, 1851, under which such predecessors in interest asked for and obtained a decree and patent in confirmation of their title, but also from repeated decisions of this court as to the meaning and effect of the decrees and patents made in pursuance of that act. Some of these decisions

are cited by us later in this brief. Furthermore, as we have elsewhere pointed out, the question as to the nature and extent of the water rights appurtenant to the lands of plaintiff in error, was a local question, dependent on state or general public law, and the decision of the state court thereon was final and conclusive.

7. The claim of plaintiff in error that the judgment of the state court interferes with the primary disposal of the public lands in California is also without merit, and presents no real and substantial Federal question.

The lands of the plaintiff in error never were part of the public domain, and the United States never had any property rights therein. Its title to the lands and its rights to the waters therein and to the waters of the Los Angeles river, were derived from the republic of Mexico, and not from the United States. The patents issued by the authorities of the United States, under the Act of March 3, 1851, were not grants.

"They were simply, 'A record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country.' "

Beard v. Federy, 3 Wall 478, 491. *

"In the legislation of congress, a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it

also embodies words of release or transfer from the government."

Langdeau v. Hanes, 21 Wall. 521, 529.

"* * * The United States, in dealing with parties claiming, under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals, established to pass upon the validity of these alleged grants, the government issued a patent, it was in the nature of a quit-claim—an admission that the rightful ownership had never been in the United States, but had passed at the time of the cession to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court."

Adam v. Norris, 103 U. S. 591, 593.

In the case of Hooker v. City of Los Angeles, *supra*, the plaintiffs in error were, as we have already pointed out, situated exactly similarly to the plaintiff in error in this case, being the owners of lands through which the Los Angeles river flows, and embraced in Spanish and Mexican grants, which had been confirmed and patented by the United States, and the controversy also involved the question of the rights of the city in that stream. This court said:

"The patents were in the nature of a quit-claim, and, under the Act of March 3, 1851 (Sec. 15), were 'conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.' "

The decisions of this court leave no ground for question as to the meaning of the words "public lands," em-

ployed in the act of September 9, 1850, admitting California into the Union.

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

Newhall v. Sanger, 92 U. S. 761, 763.

"By public land, as it has long been settled, is meant such land as is open to sale of other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of public land."

Bardon v. Northern Pacific R. Co., 145 U. S. 535
(36:806);

Cameron v. United States, 148 U. S. 301
(37:459);

Barker v. Harvey, 181 U. S. 490 (45:968).

Furthermore, as we have already established by many decisions of this court, even if plaintiff could rightfully claim that the title to his land was derived from the United States, the question as to the appurtenant water rights in the Los Angeles river, on which the land is bounded, is referred to be determined according to the general public law of California.

There is, therefore, no merit in the contention of plaintiff that the decision of the state court interferes with the primary disposal of public land, and its claim, in this regard, is not sufficient to raise a real and substantial Federal question so as to give this court jurisdiction.

8. *The eighth assignment of error, in reference to certain acts of the legislature of California, has no foundation in the record, and presents no real or substantial Federal question.*

Plaintiff in error, by way of defense, alleged, in its answer, that the legislature of California, by an act passed April 5, 1851, entitled "An Act supplementary to an Act entitled 'An Act to incorporate the city of Los Angeles,' passed April fourth, one thousand eight hundred and fifty."

"Also an act entitled 'An act to amend the charter of the City of Los Angeles, to define its limits and rights, to enlarge its powers and provide for its more efficient government,' approved March 28, 1874. Also the act amendatory thereof to-wit: Approved April 1, 1876, approved March 30, 1878, approved January 31, 1889, attempted and purported to grant and convey to the plaintiff herein the right to own in fee simple the paramount right to take and use all of the waters of said Los Angeles river as well its branches and tributaries as the main stream from its sources, to the southern boundary of said city, for the uses and purposes claimed in plaintiff's complaint herein, as well as all of the waters of said Ranchos Ex-Mission de San Fernando and of the lands of this defendant and of the public lands of the United States aforesaid; that all of said acts of said legislature are null and void under said act of Congress aforesaid admitting the state of California into the Union, and are also void under the constitution of the United States prohibiting private property from being taken for public use, except by due process of law and upon just compensation therefor." [Tr. fols. 22-23, pp. 8-9.]

For the information of the court, we will append to this brief copies of the material portions of these acts of the California legislature.

The act of April 5, 1851, authorizes the city to take from the river of Los Angeles water needed for the irrigation of lands belonging to the city, and lying outside of its corporate limits; the act of March 28, 1874, purported to grant to the city, in absolute ownership, all the waters of the river from its sources to the southern boundary of the city; also the right to develop and use all water flowing beneath the surface, in the bed of the river, between those points, "*excepting and reserving from the operation of the aforesaid grant of the water flowing in said river, unless the same be condemned and taken for public use as herein provided, all vested private rights to the water flowing upon the surface or beneath it in the bed of said river*"; the act of April 1, 1876, purported to grant the same rights in the same terms as contained in the act of March 28, 1874; the act of March 30, 1878, purported to grant to the city, in absolute ownership, the full, free and exclusive right to all the waters flowing in the river, together with the right to develop and use all waters flowing beneath the surface in the bed of said river, at any point from its source to its intersection with the southern boundary of the city; and the so-called act of January 31, 1889, provided that the city shall continue in the ownership and enjoyment of all rights to the water of the river of Los Angeles heretofore vested in it, its predecessor or predecessors, including the pueblo of Los Angeles, and shall have exclusive right to all the water flowing in the river at any point between its sources and the southern boundary of

the city, and shall have the ownership and right to develop and use all waters flowing beneath the surface, in the bed of the river, between said points.

It is implied in the assignment of error under consideration, that the state court, either expressly, or in effect, decided that these acts of the legislature "conveyed the legal title to the water right in question to the city, and were valid therefor." The record does not show that the state court made any such decision, or that such decision was necessary to or involved in the determination of this cause.

On the contrary, the record does show that the determination of the court upon the claim of the city is made to depend on the question "whether, under the general law of the locality, the old pueblo of Los Angeles, and the respondent herein as the successor, had and have, as against appellant, the prior and paramount ownership of the use of so much of the water of the Los Angeles river as is necessary for its inhabitants and for general municipal purposes."

It was established by the stipulation of facts that, at the time of the cession of California, the pueblo had the water right now claimed by the city, and that

"After the acquisition of California by the United States the pueblo of Los Angeles continued to exist and to be managed by the pueblo authorities, who continued the use of the water of said river for domestic purposes and irrigation by its inhabitants as theretofore, the water being diverted within said four square leagues; and this continued until the incorporation of the city of Los Angeles in 1850, under the act hereinbefore set out." [Tr. fol. 25-26, p. 10.]

The state court decided that, "under the general law of the locality," the city had the paramount right in the waters of the river which the old pueblo possessed. We submit, therefore, that whatever objection may have been raised or existed in the state court as against the acts of the state legislature referred to, to-wit: the acts of April 5, 1851, March 28, 1874, April 1, 1876, March 30, 1878, and January 31, 1889, is immaterial in any view of this case, since the record shows that the state court, in adjudicating the city's claim, did not consider, construe or in any way give effect to any of those acts, but based its decision on the independent ground that, under Mexican laws, the pueblo had the prior and paramount water right in question, and that such right passed to its successor, the city of Los Angeles, upon its incorporation. In other words, according to the decision of the state court, the city had succeeded to the water right claimed by it prior to the passage of the act of April 5, 1851, and the later acts referred to. The effect of these acts upon the riparian rights of owners of land on the Los Angeles river claiming title under Spanish and Mexican grants was considered in the case of *City of Los Angeles v. Pomeroy et al.*, *supra*. The situation of the defendants in that case was exactly similar to that of the plaintiff in error in this case, and the court there held in reference to these acts:

"No act of the legislature * * * can diminish or change the rights of the defendants in these lands derived from their predecessors, the Mexican and Spanish grantees."

City of Los Angeles v. Pomeroy, 124 Cal. 597, 637.

On pages 638 *et seq.*, of the same report, the Supreme Court of California declared:

"The defendants hold their lands as successors to several Spanish and Mexican grantees, under patents from the United States based upon the original grants. They claim that, even conceding the rights of the pueblo and the city's succession to those rights (a concession which they make only for the purposes of the argument on this point), they are still, by virtue of their ownership of the lands in question, entitled to the exercise of full riparian rights, except so far, and so far only, as those rights are impaired by the paramount rights of the pueblo as they existed before the change of flag and without any legislative additions thereto."

"This claim, we think, is clearly just. The legislature of California could grant nothing to the City of Los Angeles which belonged to others, and the rights of the city, as successor to the pueblo, in the lands of riparian proprietors holding under Mexican and Spanish grants, cannot exceed the rights of the pueblo itself."

In the case of *Vernon Irrigation Co. v. City of Los Angeles*, *supra*, also involving the question as to the rights of the city in the waters of the Los Angeles river, three of the acts above mentioned, to-wit: the act of April 4, 1850, the act of April 5, 1851, the act of March 28, 1874, and the act of April first, 1876, were considered, and the court, in an opinion by Temple, commissioner, held:

"I cannot see that the city has acquired any further rights to water through the various acts of the legislature referred to. * * * It will hardly be claimed that the legislature could grant to the

city the water of the river so as to deprive riparian owners of it."

Vernon Irr. Co. v. Los Angeles, 106 Cal. 237,
252-253.

Now the state court, in deciding this case, refers to and follows its earlier decisions in the cases of City of Los Angeles v. Pomeroy, *supra*, and Vernon Irrigation Co. v. Los Angeles, *supra*, and this fact conclusively shows that the court, not only did not hold that these acts had the effect of conveying or transferring to the city any right of plaintiff in error, or his predecessors in interest in the waters of the river, but that it adhered to the declaration made in the earlier cases that they did not have such effect. The decisions of the state court in the City of Los Angeles v. Pomeroy, *supra*, and the Vernon Irrigation Co. v. Los Angeles, *supra*, established the status and effect of these legislative acts, so far as the city's water right was concerned and, ever since those decisions, these acts must be read and construed just as if they expressly embodied the interpretation given them in those cases:

"The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature."

Christy v. Pridgeon, 4 Wall. 196.

In this case, the city made no claim that any of these legislative acts had the effect of transferring to it any right in the waters of the river which belonged to any other person at the time of their passage. The claim presented by the city to and adjudicated by the state

courts was the ownership of the paramount right to take and use the waters of the river to the extent of its needs, and this right was possessed by the old pueblo, and passed to the city upon its incorporation on April 4, 1850.

In the case of Crystal Springs Land and Water Co. v. Los Angeles, 82 Fed. 114, and reported under the same title in 177 U. S. 169 (44:720), the city, in its answer, disclaimed any title or claim of title to the waters of the Los Angeles river not held by it before the passage of the acts mentioned, and such disclaimer was held sufficient to divest the court of jurisdiction of the bill. In the case of Devine v. Los Angeles, 202 U. S. 313 (50:1054), the city, in its answer, made the same disclaimer with the same effect as to Federal jurisdiction. In those cases, the city, as defendant, had the opportunity to make such disclaimer, in response to allegations contained in the bills. In this case, the city, as plaintiff, did not set up or rely upon any of these acts as the source or ground of the title asserted by it, and, under the law and practice of California, it had no opportunity or right to meet the allegations of the answer with a disclaimer, or to anticipate any defense based on these acts. Section 422 of the Code of Civil Procedure of California provides:

“The only pleadings allowed on the part of the plaintiff are:

- “1. The complaint;
- “2. The demurrer to the answer;
- “3. The demurrer to the cross-complaint;
- “4. The answer to the cross-complaint.”

A thoroughly established rule of pleading, in the courts of California, is expressed as follows:

“Every complaint must contain a statement of

facts sufficient to constitute a cause of action, in ordinary and concise language, but it is not necessary to insert in it allegations for the purpose of meeting or cutting off a defense."

Blasingame v. Home Ins. Co., 75 Cal. 631, 635.

Furthermore, we ask the court to observe that plaintiff in error, in its allegations setting up these acts of the state legislature, does not assert that the city claims anything under them, or relies on any of them as the source of its title. [Tr. fols. 22-23; pp. 8-9.] It merely alleges that the state, by these acts, attempted and purported to grant the waters of the river to the city, and that they are null and void. So that, even if it be assumed that they are null and void, for the purpose of conferring on the city any right in the waters of the river that it did not already have, and that the state court should have so held, still this fact would not detract from the decision of the state court that, under Mexican laws, the pueblo had the paramount right in question, that it remained vested in the pueblo until the incorporation of the city, and that it thereupon passed to, and ever since has been owned by, the city.

In the case of Devine v. Los Angeles, *supra*, which originated in the United States Circuit Court and came to this court on appeal from a judgment of dismissal for want of jurisdiction, this court said, in reference to the effect of these acts on titles derived under confirmed and patented Spanish and Mexican grants:

"The state of California was not in the line of such titles, so that the acts of the legislature and charters complained of manifestly did not have the effect of depriving complainants of their property

or of impairing the obligation of any contract, but simply conferred on the city such rights in respect to the waters of the river as may have been vested in the state."

The answer of plaintiff in error, in the state court, is so worded as to convey the idea that the acts of the legislature of which it complains mention particularly "all of the waters of said Ranchos Ex-Mission de San Fernando and of the lands of this defendant and of the public lands of the United States." [Tr. fols. 22-23, p. 9.] An examination of these acts will show that this is not the case. These acts, in so far as they deal with water at all, refer only to the waters of the river, and do not specifically mention the waters of, in, or on said ranchos, or the land of plaintiff in error, or lands of the United States. The court will also observe that, while they purport to vest in the city "the full, free and exclusive right to all of the waters" flowing in the river Los Angeles above the southern boundary of the city, the decision of the state court, following *Lux. v. Haggan, supra*; *Vernon Irrigation Co. v. Los Angeles, supra*, and *Los Angeles v. Pomeroy, supra*, held that it was the owner of the *paramount right* only to take and use all of the waters of the river to the extent of its reasonable municipal and domestic needs, thus showing that the state court held that the right of the city was based upon the Spanish and Mexican law, and not upon any new, distinct, independent, or other grant, made by the state of California.

The decision of the state court sustaining the city's claim of title was based on grounds, not Federal, which

were sufficient to sustain its judgment, and is, therefore, not subject to review by this court on writ of error.

“Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.”

Klinger v. Missouri, 80 U. S., 13 Wall. 257, 263
(20:635, 637).

Eustis v. Bolles, 150 U. S. 361 (37:1111).

As was said in New Orleans Water Works against La. Sugar Company, 125 U. S. 18, 38:

“When there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case, though the Federal question was decided erroneously in the court below, against the plaintiff in error.”

In the last case, plaintiff in error attacked the judgment of the state court on the ground that it erred in its construction of a contract between the state and plaintiff in error, and that it did not adjudge a certain ordinance of the city of New Orleans, passed subsequently to the execution of the contract, void, because it impaired the obligation of that contract. The judgment of the state court, which was against the plaintiff in error, was based upon the law as it stood when the contract was made, and this court held:

"When the state court gives no effect to the subsequent law, but decides on grounds independent of that law that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

The argument of counsel for plaintiff in error, in support of the eighth assignment of error, is based on the ground, not that the state court expressly gave effect to the state statutes complained of for the purpose of sustaining the city's claim to the paramount water right in question, but that it must have done so, because, as stated in counsel's brief, on page 72, "without the California acts, the city would have no standing in court. There would be nothing, even apparently conveying any title to the city." The practical effect of this argument is, that the ground upon which the state court upheld the city's claim to a paramount water right in the Los Angeles river, to-wit: the law of the state existing ever since the cession of California, was unsound. This argument is disposed of by the rule, laid down in *Klinger v. Missouri*, *supra*, that where it appears that the court did, in fact, base its judgment on an independent ground, "this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one."

We, therefore, submit that no question as to the alleged repugnancy of the acts of the California legislature to the constitution of the United States was decided by the state court in this case, and that the decision of such question was not necessary to the determination of this cause.

9. *The ninth assignment of error suggests no question within the jurisdiction of this court.*

By this assignment, it is claimed that the state court decided, erroneously, that the patent and proceedings in confirmation of the city's title to its pueblo lands were not conclusive against the claim asserted by the city in this case with reference to the waters of the river on the land of plaintiff in error. This specification presents no real or substantial Federal question, for, as we have shown, in an earlier part of this brief, by decisions of this court, the rights of riparian owners of lands, the title to which has been confirmed and patented under the act of March 3, 1851, are not adjudicated and determined by the decision of the board of commissioners, but are referred to be settled according to the principles of state law. Besides, the decree and patent in confirmation of the Mexican grant, under which plaintiff in error derived title to its lands, merely included such rights in the waters of the river as were attached to the land by the local law, without defining them, and the judgment of the state court was not against the existence of these rights, whatever they were. As stated in *Phillips v. Mound City Land and Water Association, supra*, in reference to the effect of the treaty of Guadalupe Hidalgo on existing property rights in the ceded territory,

“There was nothing done but to provide that if they did in fact exist under the Mexican law, or by reason of the action of the Mexican authorities, they should be protected.”

So it may be said, in respect to the effect of confirmation proceedings, under the act of March 3, 1851, on rights incident to land within a Mexican grant, "there was nothing done but to provide that if they did in fact exist under the Mexican law, or by reason of the action of the Mexican authorities," they would be embraced in the decree and patent. We may add in this connection the further statement of the court in the Phillips case:

"Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject matter of the action, was free to act in the premises."

10. The tenth assignment of error raises no Federal question.

The point made by this specification is, that the state court decided, erroneously, that the paramount right of the city in the waters of the river might be utilized by it for all municipal and public uses and purposes within the limits of the city, as such limits may exist at the time of taking and use; that the judgment of the court should have limited such right to the original pueblo limits and should not have extended it to territory subsequently annexed to the city, and that such judgment was "contrary to the validity, force and effect of said acts of Congress (the act approved September 9, 1850, and the act approved March 3, 1851), and decrees and patents thereunder, and of Sec. 1, Art. XIV of the constitution of the United States." An examination of the decision of the state court shows that the court carefully limited its determination to the question of the ex-

istence of the city's prior and paramount right in the waters of the river, and held that "the question as to what extent this right goes * * * that is for the use of the inhabitants of what territory, and for what municipal purposes can the water be taken as against a riparian owner—does not arise and need not be considered in the case at bar * * *; and the present decision would not be authority in the case, if any such case should ever arise, where the question would be as to the extent of plaintiff's prior and paramount right, and not as to the existence of that right to any extent." It appears, therefore, that the objection expressed in this assignment of error is not well taken. However, we submit, that, even if the state court had held that the pueblo water right owned by the city could be utilized for the purpose of supplying its municipal and domestic needs, as well in the annexed territory as within the original pueblo limits, such decision would have, in no way, involved a Federal question, but would have related solely to the rights of the city under a state or general public law.

Concerning the acts of Congress invoked by plaintiff in error in this assignment, namely: the act approved September 9, 1850, and the act approved March 3, 1851, we submit that we have already clearly shown, by decisions of this court, that the judgment of the state court was not against any right or title claimed under or protected by these statutes, or any statute of the United States, and that the question of title determined by such judgment was one arising under the local law, in the

decision of which no Federal question was actually or necessarily involved.

The only provision of the Federal constitution invoked by plaintiff in error at the trial of this case was that "forbidding private property from being taken for public use, except by due process of law and upon just compensation therefor." This provision of the constitution was set up by plaintiff in error in its answer [Tr. fol. 23, p. 9], in respect to the acts of the state legislature adopted after the incorporation of the city, and also, by reference to the answer, in the objections of plaintiff in error to the admission in evidence of the matters contained in the stipulation of facts upon which the case was tried [Tr. fols. 60-6, pp. 26-9]. This, therefore, is the only provision of the constitution of the United States upon which plaintiff in error may predicate a claim of error for the purpose of this appeal. We have already pointed out that the state court gave no consideration, force or effect to any of the acts of the state legislature, above referred to, but based its decision entirely upon the general law of the locality in existence prior to their passage.

Again, no attempt is made, either in the assignment of error or in the brief of counsel, to show a taking of property without due process of law, within the meaning of the constitution of the United States. The fact that the claim of plaintiff in error was denied by the state court does not mean that the decision of that court, even though erroneous, had the effect of depriving it of property "without due process of law," as will appear from the following decisions of this court:

"Law, in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied."

Leeper v. State of Texas, 139 U. S. 462, 468.

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the constitution of the United States."

Central Land Co. v. Laidley, *supra*.

"The decision of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated, unless their conclusions are absolutely free from error."

Sayward v. Denny, *supra*.

There was a full and fair trial of this cause, according to the established forms of law, and the judgment of the state court was rendered after the parties had presented their claims, introduced the evidence upon which they, respectively, relied, and submitted the case for decision. Therefore, as stated by this court in the case of Davidson v. New Orleans, 96 U. S. 97, 105,

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

Neither may plaintiff in error claim, with any show of merit, that the judgment of the state court holding that the city was the owner of a prior right in the waters of

the river was contrary to the prohibition of the Federal constitution against the taking of private property for public use without just compensation. This controversy necessarily involved the question whether the rights of plaintiff in error in the waters of the river were subject to the rights of the city therein, and this question could only be determined from a consideration of the effect of the general law of the locality. The fact that the state court decided this question in favor of the city does not mean that property of plaintiff in error was thereby taken for the use of the city.

11. *The eleventh assignment of error raises no Federal question.*

Plaintiff in error, by this specification, merely claims that the state court erred in holding that earlier decisions of that court were determinative of the prior and paramount right of the pueblo and the city. The state court, in those cases, adjudicated the same question as was involved in this case, and, as the situation of plaintiff in error with reference to the waters of the river was exactly similar to that of the defendants in the case of Los Angeles against Pomeroy, *supra*, the decision in the latter case, at least, was properly held to be determinative of this question.

Even though this view were unsound, this fact would not create a Federal question, nor make a case within the jurisdiction of this court, as a writ of error to a state court does not lie for the purpose of reviewing and correcting erroneous decisions upon questions of local law.

Plaintiff in error, by this assignment, also makes the claim that the state court, by its judgment, denied to it

the equal protection of the laws, and deprived it of property without due process of law, in violation of the Fourteenth Amendment. No discrimination in the application of the law under which the city's claim was upheld is pointed out by plaintiff in error, and it appears from the record that plaintiff in error was treated in the same manner as were the defendants in the case of *Los Angeles v. Pomeroy, supra*, who owned land situated similarly to those of plaintiff in error. As this law is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power, it has not denied plaintiff in error the equal protection of the laws.

“Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.”

Duncan v. State of Missouri, 152 U. S. 377
(38:485).

Moreover, as we have already pointed out, there was no defense or claim made by plaintiff in error in the state court under the “equal protection” clause of the constitution, but is suggested for the first time in the assignment of error, and, under the authorities heretofore cited, is raised too late for consideration by this court.

12. *The twelfth assignment of error raises no Federal question.*

This specification relates to the admission in evidence, over the objection of the plaintiff in error, of matters

contained in the stipulation of facts relating to the use of the waters of the river, after the acquisition of California by the United States, for the purpose of supplying the city and its inhabitants with water. The ruling of the court upon this evidence related entirely to questions of state law and practice, and did not actually or necessarily involve the determination of any Federal question.

Additional Assignment of Error.

Counsel for plaintiff in error, at page 114 of his brief, presents "an additional assignment of error," that is, an assignment in addition to those contained in the record, and assumes to do so under rule 21 of this court. We find no authority for this action, as such rule does not recognize the right of counsel by this method to enlarge the grounds of appeal, as specified in the record, and, under the decision of this court, a Federal question cannot be raised for the first time after final decision in the highest court of the state, for the purpose of supporting a writ of error from this court. (*Bobb v. Jamison*, 155 U. S. 416; 39, 206.) However, we shall briefly consider the point sought to be presented by this assignment, namely: that the state court, by its judgment, denied to plaintiff in error the equal protection of the statutes of limitation contained in sections 315, 316, 318 and 319 of the Code of Civil Procedure, and section 1007 of the Civil Code of the state of California, in violation of the Fourteenth Amendment.

The trial court held that the action was not barred by any statute of limitation of the state [Tr. fols. 70-1, p. 31], and the Supreme Court of the state, on the appeal,

while it did not specifically discuss this point, approved the ruling of the lower court by a general affirmance of the judgment. The question whether the action of the city was barred by the statutes of limitation pleaded by plaintiff in error, was purely one of state law, and the decision of the state court thereon, even though assumed to be erroneous, did not make a Federal question within the jurisdiction of this court. (Bonner v. Gorman, 213 U. S. 86; Sayward v. Denny, 158 U. S. 180; Leeper v. State of Texas, 139 U. S. 462.)

Counsel for plaintiff in error does not point out wherein in the judgment of the state court, in overruling the plea of the statutes of limitation, denied to the plaintiff in error the equal protection of the laws. The decision of the state court, that the action of the city was not barred by the state statutes of limitation, was in conformity with an unbroken line of decisions by the Supreme Court of the state, holding, in reference to land devoted to a public use, that,

“There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial.”

Hoadley v. San Francisco, 50 Cal. 275, and fourteen other cases cited in support of this rule in People v. Kerber, 152 Cal. 731, 734.

Plaintiff in error may, therefore, not claim that it was subjected to an arbitrary and unjust discrimination in the construction and application of the statutes of the state. The distinction made by the state court between

property dedicated to public use and other property was neither unreasonable nor unusual, but is one quite generally recognized by courts throughout the country.

The equal protection of the laws is not denied by a law or course of procedure which would have been applied to any other person in the state under similar circumstances and conditions.

Tinsley v. Anderson, 171 U. S. 101 (43:91).

The case of Stanley v. Schwalby, 162 U. S. 255 (40:960), cited by counsel for plaintiff in error, to support the contention that this court can and should review the ruling of the state court on the plea of the statute of limitations, is not in point. That was an action of trespass to try title, brought in a Texas court against officers occupying in behalf of the United States lands used for a military station. It was set up, by way of defense, that the suit was really against the United States and against property of the United States, and that the claim of the plaintiff was barred by the statute of limitations. The state court held for the plaintiffs in the action. This court, on writ of error, decided that the United States had a good title to the land, and, therefore, that the validity of an authority exercised under the United States was drawn in question, and, since the decision of the state court was against its validity, jurisdiction existed in this court to review that decision on writ of error. The situation of plaintiff in error in this case cannot be assimilated to that of the United States or its officers and agents in the Stanley case. The question of the validity of an authority exercised under the United States was not involved in the proceedings before

the state court. Neither was the judgment of that court against the validity of any such authority, nor against any right, title, privilege or immunity claimed under the constitution, or any law or treaty of the United States, and, therefore, is not within the rule laid down in *Stanley v. Schwalby*, *supra*, that,

"So far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the constitution, laws or treaties of the United States, or upon local law, or upon principles of general jurisprudence."

Moreover, the specific and only point made by counsel for plaintiff in error in his additional assignment of error is, that the judgment of the state court overruling the plea of the statute of limitations, denied to plaintiff in error the equal protection of the laws, in violation of the Fourteenth Amendment, and we have shown that this constitutional guaranty was in no respect violated by such judgment. We have also shown, from the record, that this guaranty was not invoked by plaintiff in error in the state court.

In conclusion, on this branch of the case, we submit, that the record does not show that the decision of the state court was against any right, title, privilege or immunity of plaintiff in error which is claimed or asserted under, or is protected by, the Constitution, or any statute, or treaty of the United States; that the record does not show that any Federal question was decided against the plaintiff in error by the state court, or was involved in or was necessary to the determination of this cause

by that court; and, on these grounds, we contend that the writ of error should be dismissed for want of jurisdiction.

II.

The paramount water right claimed by the city was not land within the provisions of the Act of March 3, 1851.

I. This right was derived under the general law of the locality regulating the use of waters of natural streams by pueblos located thereon, and by ordinary riparian owners, and the question of its continued existence under American rule, as well as of its nature and extent, depends exclusively on such local or general law.

In this connection, we wish to quote from the case of *Lux v. Haggin*, *supra*, in which the court declares what were the rights of pueblos, under the Mexican or civil law, to the use of the waters of streams on which they were situated:

“The laws of Mexico relating to *pueblos* conferred on the town authorities the power of distributing to the common lands and to its inhabitants, the waters of an innavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo, but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the pobladores, the irrigable lands and the mills and manufactories within the general limits, was vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers.”

Lux v. Haggin, *supra*, page 326.

"Each pueblo was *quasi* a public corporation. By the scheme of the Mexican law it was treated as an entity, or person, having a right as such, and by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred."

Lux v. Haggin, *supra*, page 329.

The court quotes from the work of Escriche, a leading authority on Mexican law, as follows:

"Escriche says: 'Waters belong to the public which are not and cannot (thus?) be private property. Such are the waters of rivers which, by themselves, or by accession with others, pursue their course to the ocean. They may be navigable or not navigable. If navigable no one can avail himself of the waters so as to embarrass or hinder navigation. If not navigable, the owners of the lands through which they pass may use the waters thereof for the utility of their farms or industry, *without prejudice to the common use or destiny which the pueblos on their course shall have given them*, and with the modifications provided in the laws, orders, and decrees which are spoken of under the word 'acequia.''"

Lux v. Haggin, *supra*, page 330.

The court, in conclusion of its examination of the laws of Mexico relating to pueblos founded on natural streams, says:

"From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the waters; and *semble* that the pueblos had a preference or prior right to consume the

waters even as against an upper riparian proprietor."

Lux v. Haggin, *supra*, page 331.

In the case of Vernon Irrigation Company v. Los Angeles, *supra*, the question was involved as to the rights of the city, with respect to the waters of the Los Angeles river, and many Spanish and Mexican documents were put in evidence on the trial of the case, and counsel for the city also compiled and submitted a digest of Spanish and Mexican law, with reference to pueblos. The court says, in the course of its opinion, on pages 247-248:

"Now the waters of all rivers were, under the Spanish and Mexican rule, public property, to be administered and distributed for the use of the inhabitants. Apparently this was sometimes done by the pueblo authorites outside of the pueblo lands. It must be remembered that towns and villages were greatly favored under the Mexican system; that to establish them was the mode adopted for the settlement of the country. Contractors (*capitulantes*) were rewarded for organizing them. The ordinances of the king of Spain and the provisions of the government of Mexico in regard to them direct that they be located where water will be convenient. The organization of the pueblo of Los Angeles itself—to be hereafter referred to—will show the solicitude of the government in regard to this matter. Since the water belonged to the nation, and could not be acquired from it by condemnation, it would seem to follow, as a matter of necessity, that, when the pueblo was organized under the laws, a sufficiency of this water for the pueblo was appropriated to it. The country was arid. The population was at first almost wholly agricultural, and, we have seen, the waters were held by the pueblo, subject to the duty of distributing the same in the public interest.

"Nor do I think this was a mere political power which could be revoked at any time, so as to deprive the settlers who had been induced to become inhabitants of the pueblo of it. They had the same kind of right with reference to it which they had to the lands. Both were held as communal property, for the benefit of the inhabitants, and as an inducement to attract settlers."

In the case of *City of Los Angeles v. Pomeroy, supra*, wherein the city sought to condemn all the estate, right, title and interest of the defendants in and to a tract of land situate on the Los Angeles river, above the city, for the purpose of enabling the plaintiff to construct and maintain thereon head works in connection with its projected system for supplying water to its inhabitants for private and municipal purposes, the trial court, in its instructions to the jury, declared, as a matter of law, that the City of Los Angeles

"is the owner of the right to take from the Los Angeles river all the water that is reasonably necessary to give an ample supply for the use of its inhabitants, and for all municipal uses and purposes for which the city may require water. This right is measured by the necessity, and if the needs increase in the future the right will expand to include all that the needs require. This right of the city is paramount and superior to the rights of the defendants in the waters of the river. The defendants, therefore, have no right to so use or divert the water of the river as to diminish the same so that it will not furnish the amount needed for the supply of the city aforesaid, and, in determining the value of the land to be taken, this fact must be considered, and the value of the land for which defendants are entitled to compensation is its value subject to the above stated right of the city." (Page 620.)

And this instruction was sustained by the Supreme Court of the state of California, on appeal.

The foregoing state decisions show that the water right claimed by the city was conferred on the pueblo of Los Angeles by a general law of the locality, which applied alike to all pueblos located on unnavigable streams, and is, therefore, what is termed in the authorities a "natural right"; that is, a right given by general law in consideration of natural conditions, as distinguished from rights gained by contract or prescription. In this respect, such pueblo water right may be compared to an ordinary riparian right, under the common law, which, as stated in Wiel on Water Rights in the Western States, Sec. 283, "has long been called a 'natural right,'" and, as declared by the Supreme Court of California, in Duckworth v. Watsonville etc. Co., 150 Cal. 520, "exists because the stream runs by the land, and thus gives the natural advantage resulting from the relative situation." The right of the riparian owner to the natural flow of the stream by or across his land in its accustomed channel, was compared by Lord Wensleydale (Baron Parke) in Chasemore v. Richards, 7 H. L. Cas. 349, to the right of land, under the common law, to the support of adjoining land, a natural attribute of the land in its natural situation. The paramount water rights of Spanish or Mexican pueblos located on streams, like the common law water rights of riparian owners, and the common law right of land to lateral support, imposed an easement or servitude in or over the tenements of others. These rights and easements, being created by the local law, operating within a sphere where

its control is paramount, could not be abrogated or impaired by any adjudication, or supposed adjudication, under the act of March 3, 1851. The right of lateral support, while an incident to land, could not be classed as land under that act, so as to require the claimant of the soil, in order to preserve the right, to specially assert it and have it included as such in the decree and patent. The same was true of the common law riparian right, and also, we submit, of the city's pueblo water right. In other words, the city's water right existed under and by virtue of a general state policy which was of continuing force and effect, and in no wise dependent upon any proceeding or adjudication under the act of March 3, 1851.

The court will observe that, while plaintiff in error contends that the city must justify its claim to the waters of the river, if at all, under the provisions of the Act of March 3, 1851, and confirmation proceedings taken in pursuance of that act, yet plaintiff in error bases its own claim to riparian rights upon the common law. The common law in California, is, of course, not a Federal law, but is, by adoption, part of the general public law, or local law, of the state, and to such state law plaintiff in error looks, and must look, for a definition of the nature and extent of the riparian rights incident to its lands. The same, of course, must be true of the city in relation to its claim to the waters of the river.

Again, plaintiff in error contends that the city was debarred from asserting a claim to the prior or paramount water right which was owned by the pueblo, because, first, it was not specially set up and confirmed in the

proceedings before the board of land commissioners in reference to the lands of the pueblo, and second, it was not asserted by the city, or reserved for its benefit, in the proceedings before that board for the confirmation of the Mexican grant under which plaintiff in error derives title. On the other hand, plaintiff in error claims to have the ordinary riparian rights in the river, despite the fact that the proceedings in confirmation of such grant made no mention of riparian rights. In other words, in this controversy over water rights, plaintiff in error does not take consistent positions, in assailing, on the one hand, the city's claim to a paramount water right, on the ground that it is not founded on a Federal law and patent, and, on the other hand, in defending its claim to an ordinary riparian right, on the ground that it is founded on the general public law of the state.

On the river below the rancho in which the lands of plaintiff in error are located, and above the city of Los Angeles, are several Spanish and Mexican grants, the titles to which were confirmed and patented under the act of March 3, 1851. Now, it is absolutely safe to assert that, in the proceedings for the confirmation and patenting of the titles to these ranchos, including that in which the lands of plaintiff in error lie, nothing was said in the petitions, decrees or patents with respect to the riparian rights incident to such lands by virtue of the local laws; yet, it could not be claimed that the patentees lost these incidental rights by the failure to have them specifically included in the decrees and patents of confirmation. On the contrary, such decrees and patents were made in contemplation of and subject to the exist-

ing local or general laws of California concerning riparian rights, and the confirmees were obliged to refer to such laws in order to determine the nature and extent of the riparian rights pertaining to their lands. (*Hooker v. Los Angeles, supra*, and *Devine v. Los Angeles, supra.*)

Counsel for plaintiff in error lays special stress upon the proposition that the decisions of the board of land commissioners, in relation to the pueblo lands and the grant under which plaintiff in error derives title, had the effect of a judgment or decree quieting title, binding on the city and barring any claim by it to the paramount water right formerly possessed by the pueblo. Counsel ignores the fact that the easement claimed by the city with respect to the lands of plaintiff in error is created by a general law, and not by grant or prescription, and is in the nature of a negative easement, which does not constitute an interest in such lands susceptible of being cut off by a decree quieting title. In a jurisdiction where the law of riparian rights prevails, a decree quieting the title to one riparian tract against the owner of lower riparian lands would not deprive the latter of his right under the general public law to have the waters of the stream flow down without material diminution to his land; neither would a decree quieting the title to one riparian tract against the owner of upper riparian lands deprive the latter of his right, under the general public law, to have the waters of the stream flow down in its accustomed channel to and upon the property of the lower proprietor.

2. The property to which the city asserts title is incorporeal in character, and, therefore, not within the purview of the Act of March 3, 1851. The claim of the city with regard to the waters of the river in the lands of plaintiff in error, is not of the right to enter on those lands for the purpose of taking such waters but of the right to take water from the stream, presumably, where the city may have the right of entry, and, so far as it flows through the lands of plaintiff in error, the right to have the water thereof, both surface and subterranean, continue without interruption in its course through those lands, so far as may be necessary to give the city its needed supply. The existence of these rights only affect the plaintiff in error in the use and enjoyment of its lands to the extent of imposing on it a duty, in the nature of a negative servitude or easement, not to intercept or interfere with the waters of the river in such lands so as to prevent the city from taking the same, where it may have the right of entry, for supplying the needs of itself and its inhabitants. In short, the city has and claims only a usufructuary right in the waters of the river, including the underground waters in the lands of plaintiff in error.

Vernon Ir. Co. v. Los Angeles, 106 Cal. 237.

"He (riparian proprietor) has no property in the water itself, but a simple usufruct while it passes along."

3 Kent's Com. Marg. p. 439.

"This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made the

subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself. We are not called upon to determine the character of the property which the owner of a ditch has in the water actually diverted by and flowing in his ditch. With reference to such water, his power of control and right of enjoyment are exclusive and absolute, and it is a matter of little practical importance whether, in a strict legal sense, it be or be not private property. In regard to the water of the stream, his rights, like those of a riparian owner, are strictly usufructuary, and the rules of law by which they are governed are perfectly well settled."

Kidd v. Laird, 15 Cal. 162-179;

Hargrave v. Cook, 108 Cal. 72.

"The proprietors (upon both navigable and unnavigable streams) have no property in the flowing water, which is indivisible and not the subject of riparian ownership, but may use it for any purpose to which it can be applied beneficially without material injury to others' rights."

Gould on Waters, 3rd Ed., Sec. 204.

The property in controversy here, therefore, being intangible and incorporeal, and being of a nature sufficiently permanent to have applied to it the same idea of duration or quantity of ownership or estate as is applied to corporeal inheritances, must be classified as an incorporeal hereditament.

Washburn on Easements and Servitudes, 14 Ed.,
page 18.

It remains now to be seen whether this impalpable thing, this usufruct, this right to take and use the water

of a natural stream, was within the provisions of the Act of March 3, 1851, so as to make it necessary to specially set it up for confirmation.

The title of the act shows that it is for the purpose of ascertaining and settling private *land* claims.

In the first section, it is declared to be enacted for that purpose.

By section 8, it is provided that each and every person claiming *lands* in California, shall present the same for confirmation.

By section 9, the claimant or the district attorney is given the right to have the decision of the commissioners reviewed in the District Court of the district in which the *land* is situated.

Section 13 provides that all *lands*, the claims to which have been finally rejected, and all *lands*, the claims to which shall not have been presented to the commissioners, shall be considered "as a part of the *public domain* of the United States."

By the same section, a patent is directed to be issued for all claims finally confirmed, upon the claimant's presenting to the general land office *a plat of survey of the land*, certified by the surveyor general, whose duty it shall be to cause all private claims which shall be finally confirmed, to be accurately *surveyed and to furnish plats of the same*; and the surveyor general, in the *location of the claims*, is given certain powers.

The same section further provides that, if the title of the claimant to such *lands* shall be contested by any other person, it shall be lawful for such person to present a petition to the district judge for the district in which the

lands are situated, setting forth his title thereto, and the district judge is given authority to grant an injunction to restrain the party, at whose instance the claim to the *lands* has been confirmed, from suing out a patent until the title has been finally decided.

Section 14 contains provisions with regard to the presentation of claims to town lots, farm lots or pasture lots, held under grant from any corporation or town, to which *lands* have been granted for the establishment of a town by the Spanish or Mexican government, and also with regard to city, town or village lots in cities, towns or villages existing on July 7, 1846, the claims for which are to be presented by the corporate authorities of the town; and in case of the existence of a city, town or village on that date, that fact is declared to be *prima facie* evidence of a grant to such corporation; and where any city, town or village was in existence at the time of passing the act, the claim for the *lands embraced within the limits of the same* is to be made by the corporate authorities of such city, etc.

It will thus be seen that there is not a word used which refers to incorporeal rights, but the act is expressly confined, by its terms, to lands, or corporeal property.

The provisions with regard to surveys and plats, which are essential to the issuance of a patent, are utterly inconsistent with the idea that it was intended that claims to incorporeal rights (especially where not embracing the right of entry on lands) should be presented; and when the contention is made with regard to underground waters, which, of course, could not, in the nature of

things, be interfered with, without entry on the lands, the climax of absurdity is reached.

How could a survey be made of the waters of a stream, which in the course of years naturally shifts its course so as to occupy a different channel, or at least occupy a different area of superficial space ,in the different years, depending on rainfall and a variety of other circumstances?

How, too, could the limits of the *underground flow* be accurately determined so as to admit of the running of straight lines or angles?

Suppose that a survey of the channel or supposed channel of the river had been made, and the stream had subsequently changed its course and run across other land, not included in the survey; would not the city have lost its right to the river by reason of its not having been confirmed with respect to that land?

Would not the city have been limited by its patent to the land in the survey, and would not its failure to have additional land included therein have operated as a forfeiture, as regards this latter land, as much so as if no claim at all had been presented?

It certainly would not have been proper to include in the survey all lands, within the limits of which the stream could, by any possibility, have flowed in the future; for this might have included the whole country, when we take into consideration the changes in topography that are made by earthquakes, floods and other convulsions of nature.

The argument of *reductio ad absurdum* certainly applies with overwhelming force here.

The declaration of section 13, that all forfeited lands shall become part of the "public domain," is also utterly inconsistent with the inclusion of incorporeal rights, for that term has a special meaning in the land laws of the United States.

"'Public domain' is equivalent to 'public lands,' and these words have a settled meaning in the legislation of the country. The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

Barker v. Harvey, 181 U. S. 490 (45 L. Ed. 968).

The language of the act is not reasonably susceptible of any other interpretation, we submit, than that it was intended to include only such property as was *capable of augmenting the area* of the public lands of the United States, and that such property, of itself, should be of a character which would enable the government to devote it to the purposes to which government lands have been appropriated, namely, settlement and cultivation and final disposition on payment of fees or a price estimated according to acreage.

Section 14, too, expressly provides that claims are to be presented by municipalities, succeeding towns to which grants had been made by the former government of Spain or Mexico, and they are limited to *lands within the limits* of such municipalities. The lands of plaintiff in error are all, admittedly, outside of the corporate boundaries of the city of Los Angeles, and, therefore, the claim of the city to a paramount right in the waters of the river flowing through these lands could not, even under the construction placed by counsel for plaintiff in

error on the provisions of the act of March 3, 1851, have been presented for confirmation under this section thereof.

The Supreme Court of the United States, in several cases, has recognized and assumed that the act did not apply to incorporeal rights. In the case of *Fremont v. United States*, 17 How. 542, 565 (15 L. Ed. 241), it was declared, as a ground for not considering the question of sovereign right to mines in lands in California, granted by the former government, that the land commissioners had no jurisdiction of such a question, the court saying:

“The only question before the court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the Act of 1851.”

In the case of *Castillero v. United States*, 67 U. S. 17 (17 L. Ed. 360), the question of the jurisdiction of the board of commissioners, under the Act of 1851, to determine a claim to a mine, acquired under the laws of Mexico, was involved. The mine in question was described as a piece of land embracing a superficial area measured on a horizontal plane equivalent to seven pertenencias, each pertenencia being a solid of a rectangular base two hundred Castilian *varas* long; of the width established by the *ordenanzas de Minería* of 1783; and in depth extending from and including the surface, down to the center of the earth.

The attorneys for the United States in this case were Edward Bates, attorney general, B. R. Curtis, Jeremiah

Black and E. M. Stanton, and they contended that there was nothing in the treaty of Guadalupe Hidalgo, nor in the Act of 1851 calling for such an interpretation of that act, as would confer on the land commission jurisdiction of a claim to "a mine;" that it was the purpose of the act to confer upon the commission authority to adjudicate only "private land claims." They argued that:

"No provision is made by the Act of 1851 for severing such special and usufructuary rights from the land itself, and for confirming them by the limited and conditional grants which alone would be appropriate to them, nor for the practical effect of the reservation of the seignioral rights attaching to them by the Mexican law, nor for the diverse titles to the soil and 'a mine' therein, which would arise under the Mexican laws, the act being designed to operate only on the general title to the land, and to ascertain whether or not it was severable from the public domain, leaving all subordinate usufructuary rights therein to be asserted and determined in some other appropriate course of proceeding. This seems to have been the opinion of this court in *Fremont v. U. S.*, 17 How. 542 (58 U. S. 24)."

The court says, upon this branch of the case:

"Before entering upon the examination of the questions involving the validity of the title of the claimant to the mine and mining right or privilege claimed by him, it becomes necessary to consider and decide the question whether the commissioners under the Act of 3d of March, 1851, had jurisdiction over such a claim. Counsel for the claimant maintained the affirmative of that question, but the jurisdiction of the commissioners is denied by the counsel of the United States upon several grounds:

"I. They insist, in the first place, that the ownership of a mine, under the Mexican law, was not the ownership of the land in which the mine was situated; that it was simply the ownership of the right

to take from the soil the minerals therein to be found, and was recognized as a right, severed from all public and private land which was vested in the sovereign and which did not pass by a grant of land, and was capable of being acquired only by a title from the sovereign power, wholly distinct from the title to the land."

The court then says:

"2. Several of those propositions, if properly restricted and rightly applied, may well be admitted, because when so restricted and applied they are undoubtedly correct."

The court then proceeds to point out the restriction to be put upon the proposition of counsel for the government, that the commissioners, under the Act of March 3, 1851, had no jurisdiction over a mining claim, and shows that this is true only where the ownership of a mine consists alone in the right to take from the soil the minerals therein to be found, which is an incorporeal hereditament, but is not true in a case where the ownership of a mine does not consist alone in the right to take the minerals, but also embraces, if necessary to the working of the mine, a right to the exclusive possession and use of the surface of the land for an indefinite period, within specific boundaries, which is a corporeal hereditament.

In this case the property claimed by the city is merely the paramount right to take and use the waters of the Los Angeles river; and therefore comes within the rule indicated in the Castillero case, that the Act of March 3, 1851, does not apply to mere incorporeal hereditaments.

The case of Barker v. Harvey, *supra*, involved the question whether the Indians on the Warner ranch, in San Diego county, California, claiming a right of permanent occupancy by virtue of the alleged fact that they were Mission Indians, so-called, and had been in occupation of the premises long before the Mexican grants of said land, had lost their rights with respect to said land by failing to have the same presented and confirmed, under the Act of March 3, 1851. The court impliedly conceded that, had the right, involved in that case, been merely an easement, or servitude, it need not have been presented for confirmation, and based its decision upon the proposition that the right was one of permanent and exclusive occupation of land, leaving no beneficial interest in the grantee of the Mexican rancho, in the midst of which the land was located.

If then, the right to go on land and extract minerals therefrom is not "land" within the provisions of the act of March 3, 1851, much less should it be held that the right in question here, namely, the right to have the waters of the Los Angeles river, both surface and subterranean, flow down to the point where the city may divert and use the same to the extent of its needs, is "land" within the meaning of that act.

III.

The question as to the nature and extent of the water rights which went with the land of plaintiff in error was not, and could not be, adjudicated or determined by the Act of March 3, 1851, or by the decree or patent confirming the grant including such land.

This is a controversy as to usufructuary rights in the waters of the Los Angeles river, and not as to the ownership of the *corpus* of such waters. Neither party claims, or could claim, to own the water itself, but their claims must pertain merely to its use and flow.

Vattel says:

"There are things which in their own nature cannot be possessed. There are others, of which nobody claims the property, and which remain common, as in their primitive state when a nation takes possession of a country; the Roman lawyers called these things *res communes*, things common: such were, with them, the air, the running water, the sea, the fish and wild beasts."

¹ Law of Nations, c. 20 Chitty's Translation, 109,
Sec. 234.

As expressed in the Institutes of Justinian:

"By natural law all these things are common, viz.: air, running water, the sea, and, as a consequence, the shores of the sea."

Institutes of Justinian, Lib. 2, Tit. 1, Sec. 1.

The common law is stated in the following terms:

"None can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream, and take into his possession, and that during the time of his possession only."

Baron Parke in Embrey v. Owen, 6 Ex. 352.

Blackstone says:

“For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein.”

2 Blackstone's Com. 18.

“The rights of the riparian owner are limited to the ordinary and reasonable use of the water which flows in the stream, and do not include a proprietorship in the *corpus* of the water.”

Gould v. Eaton, 117 Cal. 539, 542.

In accordance with these principles, the city asserts the paramount *right to take and use* the waters of the river, to the extent necessary to supply the needs of itself and its inhabitants, and, on the other hand, plaintiff in error asserts the ordinary common law rights of a riparian owner, that is, the *right to take and use* the waters of the river for irrigation, domestic, and other beneficial purposes, on its lands, so far as may be reasonably necessary. Hence the question before the state courts was, whether the city was the owner of the water right asserted by it, and, therefore, whether the riparian rights of plaintiff in error were subject to a prior right in the city. The decision of the state court was in favor of the city's claim, and the question here is, whether its judgment was adverse to any right or title of plaintiff in error claimed under or protected by the act of March 3, 1851.

In the first place, as we have already pointed out, the right or title of plaintiff in error was derived under a Mexican grant, and not under the act of March 3, 1851 (Hooker v. Los Angeles, *supra*). In the second place,

the judgment of the state court was not against any right or title confirmed under that act. On the contrary, such judgment was perfectly consistent with the fact that the land described in the decree and patent confirming the grant, under which plaintiff in error derived title, included all rights in the waters of the river that were attached to the land at the date of the cession. This litigation imposed upon the state court the duty of determining, from the law applicable thereto, what was the *nature and extent* of those rights. The act of March 3, 1851, contained nothing whatever from which this question could be answered. What, then, was the law to be consulted on this point? Plaintiff in error asserts that it was the common law, adopted by the legislature of California as the rule of decision in that state, and that this law attached to the land of plaintiff in error the ordinary common law rights in the waters of the river. The city, on the other hand, contends that the municipal laws of Mexico continued in force in California "until abrogated or changed by the new government or sovereign"; that the prior and paramount right in the waters of the river, which, as conceded by plaintiff in error [Tr. fols. 25-26, p. 10], the former pueblo possessed, under those laws, at the date of the cession, passed to the city upon its incorporation as the successor of the pueblo, and, that the act of incorporation, which was passed prior to the adoption of the common law in that state, expressly provided for the city's succession to all property rights of the pueblo. It is apparent, therefore, that, in the proceedings before the state courts, while the parties disagreed as to the nature and extent of their respective rights in the waters of the river, they either

expressly or impliedly agreed that this controversy must be determined from a consideration of the general public or local law of the state, and this agreement, which was inevitable, excludes this case from this court for want of jurisdiction.

We have already quoted from the case of California Powder Works v. Davis, 151 U. S. 389, where this court held that the decision of the state court, in a controversy arising under conflicting Mexican grants, *both of which had been confirmed and patented*, that one of the grants was simulated, "did not involve the denial of a right of title set up under the treaty or the statute."

Definition of "land." Counsel for plaintiff in error, in considering the effect of a decree and patent in confirmation of title under the act of March 3, 1851, cites the principle of law that riparian rights, being a parcel of the land itself, are included in the description of the land, and quotes many decisions to show general acceptance of this doctrine. He states that the state court "seemed to be unconsciously impressed with these uniform lines of legal decisions when it said, 'Of course the word "land" as a conveyance carried every kind of property right and appurtenance which is legally embraced in that word.' " [Tr. fol. 98, p. 42.] The court quite naturally and properly said, "of course," on this point, but the argument of counsel as to the meaning and effect of the word "land" in a conveyance, even if it be assumed to be sound, does not reach the real question in the case respecting the riparian rights of plaintiff in error. It may be admitted that whatever rights in the waters of the river pertained to the land of plaintiff in error were part and parcel of such land, as included in

the decree and patent in confirmation, but the question to be determined in this case, so far as the lands of plaintiff in error were concerned, was, not whether those rights were part and parcel of the lands of plaintiff in error, but whether they were subject to a prior and paramount right of the city in the waters of the river. The validity of the act of March 3, 1851, was not involved in this question, and its determination by the state court in favor of the city was not against any right or title derived under or protected by that act. It may be further observed that a statute of the United States is not drawn in question and made the subject of dispute merely because adverse claims are made to rights asserted thereunder.

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time such authority is disputed."

Cook County v. Calumet & C. Canal & D. Co.,

138 U. S. 653;

Blackburn v. Portland Gold Mining Co., 175 U.

S. 571;

DeLamar's Nevada Gold Mining Co. v. Nesbitt,

175 U. S. 523.

IV.

The contention that upon the cession of California the property of the pueblo became part of the public domain of the United States is without merit and immaterial.

Apparently, it seems to counsel for plaintiff in error to be vital to his case that he should succeed in establishing the proposition, that the pueblo retained no title to its lands after the conquest, that such lands became part of the public domain of the new sovereign, and that the patent issued to the city was, in fact, a grant from the United States.

This argument merely goes to the question whether the city was entitled to have its claim to the pueblo lands confirmed and patented, and that question is no longer an open one. It was settled forever by tribunals of competent jurisdiction, resulting in a patent which was in the nature of "an admission that the rightful ownership had never been in the United States, but at the time of the cession it had passed to the claimant, or to those under whom he claimed." Adams v. Norris, 103 U. S. 591 (26:583), quoted with approval in United States v. Conway, 175 U. S. 60 (44:72, 76).

As declared in Teschemacher v. Thompson, 18 Cal. 25, and quoted with approval by Chief Justice Field in Leese v. Clark, 20 Cal. 387, 423,

"By it (the patent in confirmation), the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the laws of nations and the stipulations of the treaty; and that the grant

was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described."

Counsel for plaintiff, on page 30 of his brief, also quotes from *Leese v. Clark, supra*, as follows:

"The state and individual hold whatever property they possess which formerly belonged to the Mexican government, through the United States, etc."

This statement does not mean, and, as shown by reading the entire opinion of Chief Justice Field, who made it, was not intended to mean, that all Mexican titles terminated upon the cession of California and that the land could only be acquired from the United States. The very contrary expressly appears on the face of the opinion. At the point in the opinion where the language above quoted was employed, the court was speaking of the claims of the state and of individuals "acquired subsequent to the acquisition of California," as distinguished from claims initiated under the former government.

"At that date (the acquisition of California) the duty devolved upon the United States to protect all existing rights of property. Subsequently acquired rights, as we have already said, are therefore held in subordination to the action of the new government with respect to the rights acquired under the former government. It is only with reference to rights of property acquired under that government that the new government takes any action, and its judgment is that the Mexican government conferred upon the claimant certain property which it is bound to protect. The state and individuals hold whatever property they possess which formerly belonged to the Mexican government, through the

United States, and necessarily, therefore, in subordination to the action of the United States whilst they held it, and in subordination to any action with respect to such property which they covenanted or were bound to take upon its acquisition."

Counsel for plaintiff in error also quotes from the decision of this court, in Grisar v. McDowell, 73 U. S., 6 Wall. 363 (18:865), as follows:

"It is enough that the title had not passed to the plaintiff, but remains in the United States."

"But it is sufficient, as we have already said, that the lands remained the property of the United States."

An examination of the decision in that case discloses that the statements quoted by counsel were specifically made in reference to lands claimed by the city of San Francisco as part of its pueblo grant, which, as stated by the court, "have been excluded from the lands confirmed to the city in satisfaction of its claim," and, because of that fact, were considered by the court as "part of the public domain."

Counsel for plaintiff, on page 34 of his brief, also quotes from Woodworth v. Fulton, 1 Cal. 295, 307, which held:

"Even though San Francisco had become a pueblo previous to the conquest, and had been invested with all the rights incident to such character, the lands within its limits continued a portion of the public domain."

That case involved the question of the validity of grants made by alcaldes while California was in the military occupation of the United States, *and it was expressly overruled* in the later case of Cohas v. Raisin, 3

Cal. 461, 453. The case of *Woodworth v. Fulton*, *supra*, was examined and referred to as being overruled in the cases of *Welch v. Sullivan*, 8 Cal. 187; *Treadwell v. Payne*, 15 Cal. 498; *Hart v. Burnett*, 15 Cal. 530; also in *Merryman v. Bourne*, 9 Wall. 592, 602.

Counsel for plaintiff in error plainly misinterprets the decision of the Supreme Court of California in *Ward v. Mulford*, 32 Cal. 365, from which counsel quotes the statement:

“In private proprietorship and in sovereign right, the United States succeeded the Mexican government. In both these respects California, so far as she acquired any right in either, succeeded the United States and became privy in estate in respect to all lands within her borders, whether such as may be held in private or sovereign right.”

This language does not mean, as counsel seems to think, that, in the view of the state court, property rights which had been granted by the Mexican government into private proprietorship were extinguished by the cession, but simply means that all lands which, at the time of the cession, were still retained by the Mexican government in private ownership, such as its ordinary public domain, or in sovereign right, such as its tide lands, passed to the United States. The state court, pursuing this subject further, also stated:

“In respect to the latter (that is, lands held in sovereign right), as in respect to the former (that is, lands held in a proprietary capacity), the United States succeeded to the title and took it upon precisely the same terms upon which the Mexican government held it at the date of the cession. And so of the state. *If the Mexican government had made any rightful disposition of lands which she held as*

sovereign, neither the United States nor the state, as succeeding sovereigns, could disregard it any more than in the case of other lands."

If then, at the time of the cession, the title of the Mexican government to any of its lands was subject to rights or estates which had been granted by it to individuals or municipalities, the cession did not extinguish these outstanding rights, but, as stated by the court:

"The United States succeeded to the title and took it upon precisely the same terms upon which the Mexican government held it at the date of the cession."

The case of *The People v. Kerber*, 152 Cal. 731, cited by counsel for plaintiff in error, and holding that a grant, or attempted grant, of tide lands by the alcalde of the pueblo of San Diego, in California, after the cession of that territory by Mexico, was void, has no bearing on the question whether the city of Los Angeles succeeded to and retains the paramount water right which the old pueblo had at the time of the cession, and, indeed, would not be in point upon the question whether the city was entitled to confirmation of its claim to the lands granted to the pueblo of Los Angeles prior to the cession, even if that question were an open one, which, of course, is not the case. The ground of the decision in the Kerber case was, that the land involved therein, which, being tide land, had been held by the former government in virtue of its sovereignty, passed, by the cession, to the United States, and was taken and held by it in trust for the future state that should include such territory. The fact that, after the cession, no proceedings affecting the rights of the United States, whether sovereign or pro-

prietary, over lands acquired by it from the Mexican government could be authorized by any local law or regulation, but could only be taken in pursuance of authority from the United States, does not show that the rights of pueblos within the territory over their municipal lands did not survive the cession. Neither does it show that such pueblos could not dispose of their lands. The converse of this proposition was brought out by this court in the case of *More v. Steinbach*, 127 U. S. 70, 81, as follows:

“No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject. The cases in the Supreme Court of California and in this court which recognize as valid grants of lots in the pueblo or city of San Francisco by alcaldes appointed or elected after the occupation of the country by the forces of the United States, do not militate against this view. Those officers were agents of the pueblo or city, and acted under its authority in the distribution of its municipal lands. They did not assume to alienate or affect the title to lands which was in the United States.”

There need not be the slightest uncertainty as to the final and settled attitude of the Supreme Court of California in respect to the effect of the treaty of Guadalupe Hidalgo upon the property rights of pueblos within the ceded territory. The leading decision of that court upon this point was in *Hart v. Burnett*, 15 Cal. 530. The opinion of the court was delivered by Baldwin, justice, and specially concurred in by Field, chief justice, and afterwards an associate justice of this court.

At page 559 of that report the court states:

"Neither military occupation or complete conquest produces, as a general rule, any change in private property, no matter whether belonging to individuals or municipalities, or by what kind of title it may be held."

At page 560 of said report the court says:

"Again, suppose it to be admitted that pueblos had no absolute right of property in any part of the four leagues of land within their general limits, and that the legal title still remained in the Mexican government, subject only to the uses of the towns for the purposes and under the restrictions imposed by the laws and regulations; it by no means follows that, upon the complete conquest and cession of California, this land became a part of the public domain of the United States.

"In the case of *The City of New Orleans v. The United States*, it was held by the United States Supreme Court that property may be dedicated to the public use without vesting the legal title, and that when such use had once been created it could be destroyed only by an exercise of the right of eminent domain. In that case, France had permitted a certain part of the city of New Orleans to be used as a quay. The same use had been continued under the Spanish sovereignty, and after its retrocession by Spain to France, and its cession by the latter to the United States. Neither of these governments had ever conveyed any legal title to these lands, either to the city of New Orleans or to the public; it was therefore contended that by the last cession the title or right of property in this land had passed, with all other public rights, to the United States. But the court said that, admitting the legal title to have been in the king of Spain, if he held the land in trust for the use of the public, the title in him was subject to such uses, and the act of cession could not destroy them; that the United States acquired no right to dispose of such land, as other public lands of the United States; moreover, that the right to regulate this use, and to carry out the trust, be-

longed to the state of Louisiana and the people, such a right never having been delegated to the federal government." (10 Pet. 736, 737.)

The case of the United States v. Santa Fe, 165 U. S. 675, is cited by counsel for plaintiff in error to support his contention that the title to all pueblo lands within the territory ceded by the Mexican government to the United States passed, by virtue of the cession, to the United States, is also without bearing on this controversy. That case might have some relevancy to the question whether the city of Los Angeles was entitled to confirmation of its claim to its pueblo lands, if that question were open for determination, but, of course, it is not. The board of land commissioners, in the case of Los Angeles v. United States, awarded to the city its pueblo lands, amounting to four square leagues, and a patent therefor was duly issued by the United States, and neither the decree of confirmation nor the patent is subject to attack on any ground or from any source. In the Santa Fe case the question whether that city was entitled to confirmation of its claim to a pueblo grant was an open one, calling for adjudication by this court, and, whatever was said by the court as to the merits of its claim, or upon the general subject of grants to pueblos by Spain or Mexico, would justify no inquiry here as to whether the city of Los Angeles was really entitled to confirmation of its claim to its pueblo property. Moreover, even though this question were open for consideration, there is nothing in the decision of the Santa Fe case that necessarily militates against the view that the decree and patent, in confirmation of the claim of Los

Angeles to its pueblo lands, were well founded. The fundamental question in the Santa Fe case, as stated by this court, was:

"Did the Spanish law, *proprio vigore*, confer upon every Spanish villa or town a grant of four square leagues of land, to be measured from the center of the plaza of such town?"

This court decided that the Spanish law did not, *proprio vigore*, confer upon *every* Spanish villa or town such a grant. This conclusion was reached after an examination by the court of the ancient laws of Spain in reference to the establishment of pueblos by contract, for it was upon these laws that the city of Santa Fe based its claim. The town was settled about the year 1543 by a colony of deserters from the Spanish army, and, as stated by the court,

"was presumably, in its permanent creation, the outcome and development of the success of the Spanish arms, rather than of the exercise of the power to induce settlements by contracts with individuals or otherwise."

It also appeared from the record in the case that the city presented to the Spanish governor, in 1715, a petition for a concession of a tract of swamp land situated within the four square leagues claimed to have been granted to the pueblo, upon its settlement, "by operation of law," and this was referred to by the court as a circumstance showing that the claim had no foundation and was not deemed by any one, at that time, to exist. The decision in the Santa Fe case can, at most, therefore, be only considered as having determined that the Spanish law did not, *proprio vigore*, confer upon a Spanish villa

or town settled by contract a grant of four square leagues of land; that, in the case of a settlement of this character, the Spanish law attached certain conditions to be thereafter performed by the contractor in order to become entitled to a pueblo grant; that the town of Santa Fe, which claimed that such a grant had been made under the Spanish laws, showed no compliance with these conditions, and its application to the Spanish governor, in 1715, for a grant of land within the alleged pueblo limits, was inconsistent with the theory that the city then claimed or understood that it was entitled to a pueblo grant by operation of law. This decision, therefore, cannot be said to have any application to the question whether the pueblo of Los Angeles, upon its foundation, became entitled to four square leagues under the laws of Spain. It was founded by direct governmental action, and the decision in the Santa Fe case, as we read it, while not specifically deciding the point, by reason of the fact that it was not before the court and necessary to be determined, recognized that, where the government of Spain, by direct official action, established a pueblo, an implied grant of lands, for the use and benefit of the inhabitants of the new settlement, resulted.

In this connection we wish to call attention to the fact that the record in this case shows that two patents were issued by the United States to the city of Los Angeles for its pueblo lands, under the act of March 3, 1851, one in 1866, and the other in 1875. [Tr. fols. 42-51, pp. 20-2.] The latter patent omitted a false recital contained in the earlier one, to the effect that the claim of the city was founded on a Mexican grant "to the peti-

tioners made on the 25th of August, 1844." As a matter of course, no grant was ever made by the Mexican government in 1844, or at any other time to the petitioners, who were the mayor and the common council of the American city of Los Angeles, for that municipal corporation was not created until 1850. The later patent does not show on what ground the claim is based, but the decree of the board of land commissioners shows that confirmation was based on the grant made by the laws of Spain, under whose authority the pueblo was founded.

V.

The paramount water right claimed by the city was incident to the pueblo and its successor, and to the pueblo lands; and even if it should be deemed that such right was subject to the jurisdiction of the land commissioners, then such right was confirmed by the decree and patent for the pueblo lands.

The pueblo water right had its origin in the civil law which prevailed in Spain and Mexico, while the grant of the pueblo lands was made in pursuance of the orders, decrees and regulations of the Spanish sovereigns concerning the establishment of pueblos in the colonies. As stated by the Supreme Court of California in *Lux v. Haggin*, *supra*, concerning the rights of a pueblo in the waters of an unnavigable river on which it was situated:

"A species of right to the use of all its waters necessary to supply the domestic wants of the pobladores, the irrigable lands and the mills and manufactories within the general limits, was vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers. (Page 326.)

"Each pueblo was *quasi* a public corporation. By the scheme of the Mexican law it was treated as an entity, or a person, having a right as such, and by reason of its title to the four square leagues of land, to the use of the waters of the river on which it was situated, while as a political body it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred. (Page 329.)

"The pueblos had a preference or prior right to consume the waters, even as against an upper riparian proprietor." (Page 331.)

Under the municipal laws in force in California at the time of its cession, and also at the time of the proceedings for the confirmation of the titles to the pueblo lands and the rancho embracing the lands of plaintiff in error, the rights in the waters of the river incident to the lands of plaintiff in error were subject to a paramount right therein vested in the pueblo. The confirmatory decree and patent in each case embraced, without express mention, all rights in the waters of the river that were attached by law to the land described, thus leaving the rights pertaining to the rancho and the rights pertaining to the pueblo in the same condition, as to their nature and effect, as they were in under the Mexican law at the time of the cession, with a quitclaim from the new sovereign of any interest in the property. However, by virtue of the municipal laws under which the rights of the pueblo and of the grantee of the Mexican rancho, respectively, arose, and which regulated the use of the waters of the river by each, the pueblo took and held its rights in trust for its inhabitants, and was clothed with power "to provide for the distribution of the waters to

those for whose benefit the right and power were conferred." (*Lux v. Haggin, supra.*)

And, finally, on this branch of the case, there is nothing in the act of March 3, 1851, or in the decree and patent for the pueblo lands, or in the decree and patent confirming the grant under which plaintiff in error derives its title, that is opposed to the claim that said lands carried with them a prior or preferred right in the waters of the river for the use and benefit of the inhabitants of the municipality and its successor.

VI.

Statements in the brief of counsel for plaintiff in error which should be corrected, or entirely disregarded, because not justified by the record.

Counsel for plaintiff in error assumes, in his argument, that the record shows that if the riparian rights of plaintiff in error are subject to a prior right in the city, then its lands are worth less by more than \$400,000 than they would be if such limitation did not exist. He says, on page 88 of his brief, "the damage in the case at bar on some 10,000 acres of the valley land is stipulated to be over \$400,000," and, on page 133 of his brief, that the judgment of the state court has deprived his client "of over \$400,000 worth of property." Reference to the record will show that it contains nothing whatever upon which to base either of these statements. It is alleged in the complaint, in paragraph IV, that the land of plaintiff in error, as therein described, is subject to the paramount water right claimed by the city [Tr. fols. 7-8,

pp. 2-3]. It is alleged in the answer, in paragraph IV, that plaintiff in error is the owner of a larger tract of land, including the premises described in the complaint, and "that the value of the premises in controversy is over \$500,000." [Tr. fol. 13, p. 5.] It was stipulated by the parties,

"That the value of the premises in controversy herein is over \$400,000, and that said defendant (plaintiff in error) and their predecessors in interest have paid all taxes or assessments levied on said lands, and have been in the actual and exclusive possession of said lands since the granting and patenting thereof, using the same for the ordinary purposes of husbandry, farming and pasturage, claiming to own the same under said grant, decree and patent." [Tr. fol. 53, p. 22.]

What, then, are "the premises in controversy herein," within the meaning of the stipulation? The pleadings, as we have seen, give rise to the controversy whether the ownership of the portion of the lands of plaintiff in error described in the complaint, and containing "some 10,000 acres," is subject to the paramount water right claimed by the city. It is plain, therefore, that the stipulation as to "the value of the premises in controversy herein" refers to this portion of such lands, which, according to the stipulation, the plaintiff in error has been using "for the ordinary purposes of husbandry, farming and pasturage." We submit, therefore, that the statement of counsel, that "the damage in the case at bar on some 10,000 acres of the valley land is stipulated to be over \$400,000," is entirely unfounded, and that his statement that the judgment of the state court has deprived plaintiff in error of property worth over \$400,000, or any other amount, or any property at all, cannot be

justified from the record. There is nothing whatever in the stipulation of facts, or elsewhere in the record, on the point of damage, or from which an inference could be drawn as to the effect of the judgment of the state court upon the value of the lands of plaintiff in error. We say that the record contains nothing from which any such inference could be drawn. However, it may readily be inferred that the judgment of the state court did not affect the market value of such lands to any extent whatever, since it appears that, at the time this action was brought, the Supreme Court of California had, in the earlier cases of *Lux v. Haggin*, *supra*; *Los Angeles v. Pomeroy et al.*, *supra*, and *Vernon Irrigation Co. v. Los Angeles*, *supra*, established the proposition that the city of Los Angeles had a prior right in the waters of the Los Angeles river and its tributaries. The judgment of the state court in this case, being in line with those decisions, could hardly have affected the value of the lands of plaintiff in error in the market.

Counsel for plaintiff in error, on page 88 of his brief, also asserts, as based on the stipulation of facts, that "the total area to be deprived of water embraces some 800 square miles." We submit that the stipulation of facts, or any other part of the record, does not show that a prior right in the city in the waters of the river deprives, or will deprive, any land whatever of water. The claim of the city is, that the rights in the river of riparian owners above the city are subordinate to those of the city therein, and not that they have no rights at all in the waters of the river, and this is the effect of the judgment. The stipulation of facts embraces a map purporting to

show the watershed of the river and its tributaries [Tr. fol. 57, p. 24], but neither this map, nor any other part of the record, shows the area of the lands riparian to the main stream or its tributaries. It does show, however, that fully three-quarters of such watershed is mountainous territory. It further shows the location of the lands of plaintiff in error, including the portion thereof "in controversy herein," being embraced within the Rancho Ex-Mission San Fernando. According to the stipulation of facts, this rancho includes 121,619 acres [Tr. fols. 51-52, p. 22], and it appears from the answer of plaintiff in error that it is the owner of the south half of this rancho, "excepting from said south half the lands of the Lankershim Ranch Land & Water Co." [Tr. fols. 12-13, pp. 4-5], which, as appears from such map, contains about 12,000 acres. So that plaintiff in error, according to its pleading and the stipulation of facts, owns about 48,809 acres of land in the southerly side of the Los Angeles river valley, and of this only the easterly portion, containing about 10,000 acres, and being the lands described in the complaint, is affected by the claim of the city to a prior right in the waters of the river. The remainder of the lands of plaintiff in error, or nearly 39,000 acres in the valley of the Los Angeles river, is not affected by such claim, and as the stipulation of facts shows that the city made a disclaimer in this case [Tr. fol. 59, p. 25], the court may reasonably infer, and counsel for plaintiff in error knows, that such disclaimer applied to all of the lands of plaintiff in error, excepting the tract of about 10,000 acres described in the complaint. Counsel for plaintiff certainly does not

wish, by statements as to matters of fact outside of the record, to convey to the court the impression that all of the lands within the watershed of the Los Angeles river, including mountains and valley, are affected by the claims of the city, when it appears from the record that only a minor part of the lands of plaintiff in error itself, which are located in the valley of the river, is affected by such claims. The argument in this case should be confined to the record, and only so far as it is based on the record is it entitled to consideration.

Again, counsel for plaintiff in error asserts, on page 122 of his brief, that

“The decision of this court in this case is of vital importance to more than a hundred thousand of the property owners in California, and will affect the value of millions of acres of land.”

This is wholly outside of the record, except that it appears from the stipulation of facts that the population of the city of Los Angeles was 200,000 in 1905 [Tr. fol. 56, p. 24], and, as a matter of course, the inhabitants of that city are vitally concerned in the outcome of this controversy. The record shows that the city and its predecessor have exercised and enjoyed the water right, claimed by it, for more than one hundred and twenty-five years, beginning sixty-five years before the making of the Mexican grant under which plaintiff in error claims title to its lands. The waters of the river are, in truth, the life blood of the city, situated, as it is, in a semi-arid country, and the public interests, as well as the plain intendment of the law under which the rights asserted by it arose, require that those rights, which have

heretofore been fully vindicated by both Federal and state decisions, should no longer be deemed a proper subject of dispute or litigation. And it should be added, at this point, that the secret of the value of the lands of plaintiff in error is not the water on or in those lands, but is their proximity to a large and thriving city. Plaintiff in error has no real interest in crippling the city of Los Angeles, for the present and prospective value of its lands, and of other lands on the Los Angeles river, depends mainly on the continued development of the city; and its ancient prior right in the waters of the river, more than anything else, is indispensable to its existence and prosperity.

In conclusion, and by way of a brief summary, we submit that we have shown from the record, and by reasoning which admits of no satisfactory answer,

On the question of jurisdiction:

I. That the record does not show that a real and substantial Federal question was presented to the state court for decision, or was actually decided by that court, or that the decision of such a question was necessary to the determination of this cause. On the contrary, the question whether the city was the owner of the water right asserted by it was one of local law, upon which the decision of the state court was final and conclusive.

II. That the right or title of plaintiff in error to its lands was not claimed under or created by the treaty of Guadalupe Hidalgo, or the act of Congress, approved March 3, 1851, or the act of Congress approved September 9, 1850, admitting California into the Union, and

forbidding interference by the state with the primary disposal of public lands, or any other statute of the United States. On the contrary, such right or title was derived under a Mexican grant, and the rights in the river incident to the lands were attached thereto and defined by the general law of the locality, and pertain to lands which were never part of the public domain of the United States.

III. That the rights of plaintiff in error, as well as those of the city, in the waters of the river are dependent upon and defined by the local law, and the decision of the state court as to the nature and extent of these rights was not against any title or right claimed under any treaty, or statute, or the constitution of the United States.

IV. That this court has, in an unbroken line of decisions, declared that questions as to the nature and extent of water rights in streams pertaining to lands patented by the United States and located on such streams, are to be settled according to the principles of the local law, and has thus caused such questions to be devoid of any substantial foundation or merit when relied on to confer Federal jurisdiction.

V. That plaintiff in error, at the trial of this case, did not set up any right, privilege or immunity under the Federal constitution, excepting the guaranty against the taking of private property for public use without due process of law and just compensation [Tr. fol. 23, p. 9]. Therefore, the claim of a Federal question under the "equal protection" clause of the constitution, made by plaintiff in error for the first time in its assignments of

error, comes too late for consideration by this court.

esides, the record shows on its face that plaintiff in error was not denied the "equal protection" of the laws. It also shows that the decision of the state court against the claim of plaintiff in error was rendered after a full and impartial trial, under the established forms of law, and was based on a construction of the local law, and such decision, therefore, even though erroneous, does not deprive plaintiff in error of property without due process of law. Moreover, such decision could not be said to have the effect of a taking of property of plaintiff in error merely because it was adverse to the claim of plaintiff in error.

VI. That there is no color of merit in the claim of plaintiff in error that the decrees and patents, under the act of March 3, 1851, adjudicated and determined the nature and extent of the rights of the parties in the waters of the river. This claim is plainly opposed to the letter and the purpose of the act of March 3, 1851, and to decisions of this court with respect to questions of water rights pertaining to confirmed and patented Spanish and Mexican grants, and, therefore, the decision of the state court against the contention of plaintiff in error did not involve or create a Federal question.

VII. That the claim of a Federal question with respect to the acts of the state legislature, passed after the incorporation of the city in 1850, has no foundation in the record, which shows that the judgment of the state court in favor of the city was based on the general law of the locality in existence prior to the passage of those acts, and that it gave no effect whatever to those acts;

And on the merits of the case:

VIII. That the act of March 3, 1851, did not provide nor contemplate that claims to rights and appurtenances pertaining to land should be specially set up for confirmation. That the water rights of the city pertained to its pueblo grant, and to the municipality as a public corporation, and, like the rights of plaintiff in error, were dependent upon and defined by the general law of the locality, and not the act of March 3, 1851, or any supposed adjudication thereunder.

IX. That the rights of the city in the waters of the river constitute an incorporeal hereditament, and the act of March 3, 1851, made no provision for presenting or confirming the title to property of this nature; besides, the rights of the city in the waters of the river are dependent on and defined by the municipal laws of California, which are of controlling and continuing effect, and decrees and patents under the act of March 3, 1851, were made in contemplation of the local laws in respect to rights in land included in such decrees and patents.

X. That the paramount right of the city in the waters of the river does not give the city any interest in the lands of plaintiff in error, but merely imposes a limitation in the nature of a negative servitude, requiring plaintiff in error, as owner of its lands, to refrain from any interference with the flow of the stream through its property that would prevent the city from obtaining sufficient water to supply its needs.

XI. That confirmation of the Mexican grant, under which plaintiff in error derives its title, no more affected the limitation imposed by the general local law on the

water rights of plaintiff in error, for the benefit of the city, than it affected the right of a neighboring owner, under the local law, to lateral support from land included in such grant, or the right of a lower riparian owner to have the waters of the stream flow down in its accustomed manner across the land of plaintiff in error to and across the lands of such lower riparian owner.

XII. That the paramount water right claimed by the city was incident to the pueblo and the city, its successor, and to the pueblo lands, and confirmation of the pueblo grant included, without express mention, such rights and all other rights and appurtenances attached by law to such lands.

We, therefore, submit that the writ of error should be dismissed for want of jurisdiction, or, if the case is held for adjudication on the merits, that the judgment of the state court should be affirmed.

Respectfully,

LESLIE R. HEWITT,

W. B. MATHEWS,

Attorneys for Defendant in Error.

APPENDIX.

**Appendix containing copies of portions of
Acts of the Legislature of California of 1851,
1874, 1876, 1878 and 1889, relating to the City of
Los Angeles.**

(1) "An act supplementary to an act entitled 'An Act to incorporate the city of Los Angeles,' passed April fourth, one thousand eight hundred and fifty." Passed April 5, 1851.

3. The corporation of the city of Los Angeles shall retain all the powers and rights promised by the former ayuntamiento of said city over the public lands belonging to said city, and not included within its present incorporated limits; to lease, sell, or otherwise dispose of said lands, as also to take from the river of Los Angeles the water needed for irrigation of said lands, by means of a dam or dams built without the incorporated limits aforesaid; but the said corporation shall exercise no municipal authority over said lands except to regulate the taking and distribution of water for irrigation as aforesaid.

Stats. of California, 1851, p. 329.

(2) "An act to amend the charter of the city of Los Angeles, to define its limits and rights, to enlarge its powers, and provide for its more efficient government." Passed March 26, 1874.

ARTICLE II.

Section 1. That there be and hereby is granted to said corporation, to be by it held, used, and enjoyed in absolute ownership the full, free, and exclusive right to all of the water flowing in the river of Los Angeles at

any point from its source or sources to the intersection of said river with the southern boundary of said city; also the right to develop, economize, use and utilize all waters flowing beneath the surface in the bed of said river at any point or points between the points of termini above given, and for that purpose it is hereby declared that the powers to condemn property outside of the limits of said city, given by the provisions of section two, article two, of this act, in so far as the same relate to the condemnation of property in water for increasing the water supply of said city, are intended to be given, and to be restricted to such sources of supply and to the rights therein, excepting and reserving from the operation of the aforesaid grant of the water flowing in said river, unless the same be condemned and taken for public use as herein provided, all vested private rights to the water flowing upon the surface or beneath it, in the bed of said river; *and provided*, that said corporation shall not in any manner dispose of, transfer, or convey any portion of said water, or any right to develop or use the same, or any portion thereof, to any corporation, association, individual, or other person who might or would use the same in any way prejudicial to the use thereof for irrigation within the limits of said city, or who might or who would at any time, for any good or valuable consideration, desire to sell, or in any way dispose of to any other person, natural or artificial, any interest therein or right to the use thereof; *and provided further*, that the zanjas which are within the limits of said city, known as the principal zanja and zanjas number one, two, three, four, five, six, seven, and eight, are hereby declared pub-

lic zanjas; and the quantity of water which has heretofore generally flowed in each one of said zanjas is hereby declared to be the quantity which by right belongs to each one of said zanjas, and to the farmers and fruit growers who are benefited by their use. * * *

Stats. of California, 1873-74, p. 633.

(3) "An act to revise an act entitled "An Act to amend the charter of the city of Los Angeles, to define its limits and rights, to enlarge its powers, and provide for its more efficient government," approved March twenty-sixth, A. D. eighteen hundred and seventy-four." Passed April 1, 1876.

ARTICLE II.

Section 1. That there be and is hereby granted to said corporation, to be by it held and enjoyed in absolute ownership, the full, free, and exclusive right to all of the water flowing in the river Los Angeles, at any point from its source or sources to the intersection of said river with the southern boundary of said city; also the right to develop, economize, use, and utilize all waters flowing beneath the surface in the bed of said river, at any point or points between the points of termini above given; and for that purpose it is hereby declared that the powers to condemn property outside of the limits of said city, given by provisions of section two, article two, of this act, in so far as the same relate to the condemnation of the property in water, for increasing the water supply of said city, are intended to be given and to be restricted to such sources of supply, and to the rights therein; excepting and reserving from the operation of the

aforesaid grant of the water flowing in said river, unless the same be condemned and taken for public use as herein provided, all vested private rights to the water flowing upon the surface, or beneath it, in the bed of said river; *and provided*, that said corporation shall not in any manner dispose of, transfer, or convey any portion of said water, or any right to develop or use the same, or any portion thereof, to any corporation, association, individual, or other person who might or would use the same in any way prejudicial to the use thereof for irrigation within the limits of said city, or who might or would at any time, for any good or valuable consideration, desire to sell, or in any way dispose of to any other person, natural or artificial, any interest therein or right to the use thereof; *and provided further*, that the zanjas which are within the limits of said city, and known as the principal zanja, and zanjas numbers one, two, three, four, five, six, seven and eight, are hereby declared public zanjas, and the quantity of water which has heretofore generally flowed in each one of said zanjas is hereby declared to be the quantity which by right belongs to each one of said zanjas, and to the farmers and fruit growers who are benefited by their use. * * *

Stats. of California, 1875-6, p. 692.

(4.) "An act to amend an act entitled 'An Act to revise an act entitled an act to amend the charter of the city of Los Angeles, to define its limits and rights, to enlarge its powers, and provide for its more efficient government,' approved April 1st, 1876. Passed March 30, 1878.

ARTICLE II.

Section 1. There is hereby granted to said corporation, to be by it held and enjoyed in absolute ownership, the full, free, and exclusive right to all the water flowing in the river Los Angeles, at any point from its source or sources to the intersection of said river with the southern boundary of said city; also the right to develop, economize, use, and utilize all waters flowing beneath the surface in the bed of said river, at any point or points between the points of termini above given, and for that purpose it is hereby declared that the powers to condemn property outside of the limits of said city, given by provisions of section 2, article II, of this act, in so far as the same relate to the condemnation of the property in water for increasing the water supply of said city, are intended to be given and be restricted to such sources of supply, and to the rights therein, and provided that said corporation shall not in any manner dispose of, transfer, or convey any portion of said water, or any right to develop or use the same, or any portion thereof, to any corporation, association, individual, or other person, who might or would use the same in any way prejudicial to the use thereof for irrigation, domestic and culinary purposes, within the limits of said city, or who might or would at any time, for any good or valuable consideration, desire to sell or in any way dispose of to any person, natural or artificial, any interest therein, or right to the use thereof. * * *

Stats. of California, 1877-8, p. 642.

(5) "Joint resolution approving the charter of the city of Los Angeles, in Los Angeles county, California, voted for and ratified by the qualified electors of said city, at a special election held therein for that purpose, on the twentieth day of October, 1888." Passed January 31, 1889.

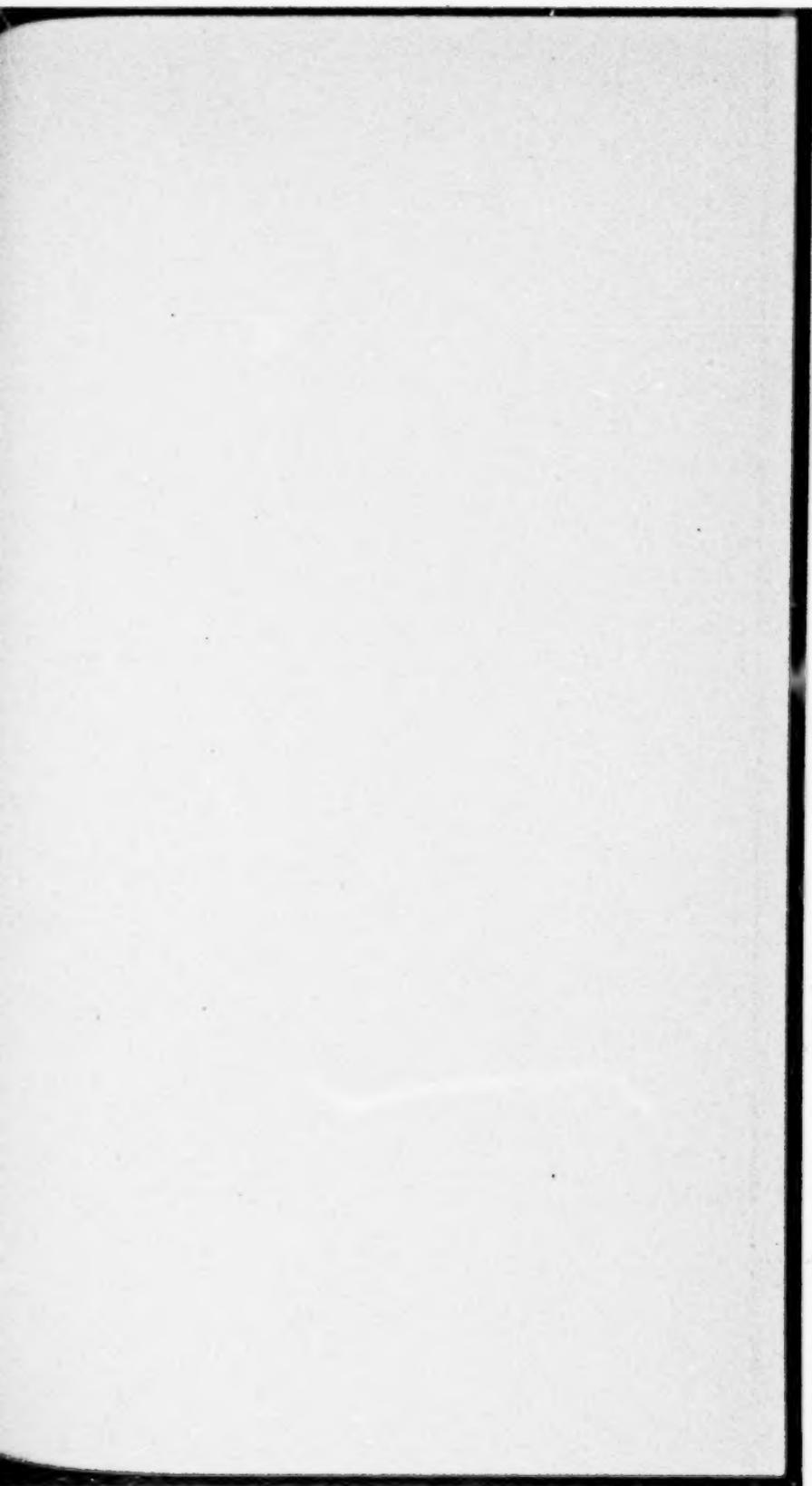
ARTICLE XVIII.

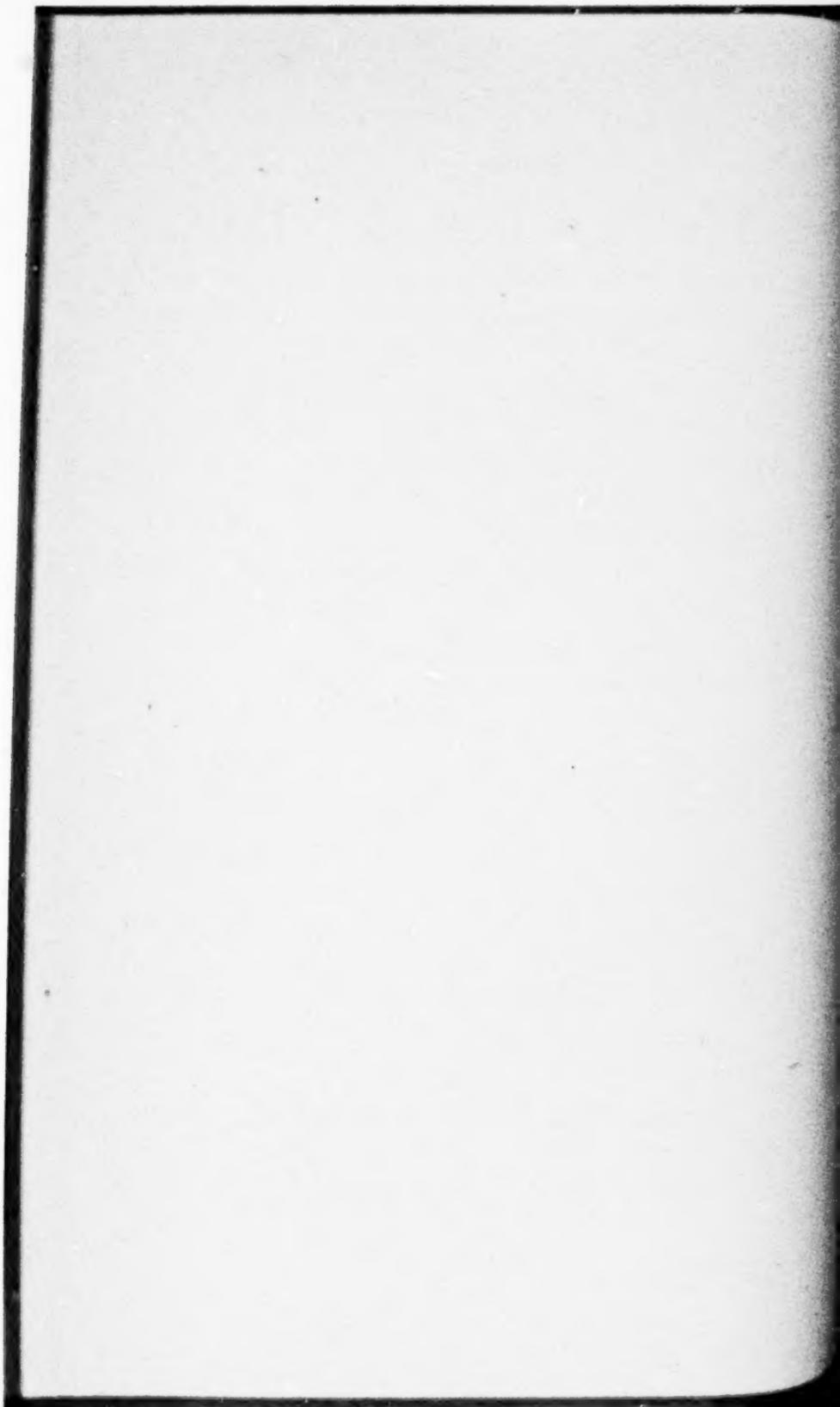
Section 190. The city of Los Angeles shall continue in the ownership and enjoyment of all rights to the water of the river Los Angeles heretofore vested in it, its predecessor or predecessors, including the pueblo of Los Angeles, and is hereby declared to have the full, free, and exclusive right to all the water flowing in the said river at any point from its source or sources to the intersection of said river with the southern boundary of said city, and also the ownership of, and the right to develop, economize, control, use, and utilize all waters flowing beneath the surface in the bed of said river at any point or points between the points of termini above named.

Section 191. The said city shall not convey, lease, or otherwise dispose of its right in said waters, or any part thereof, or grant or lease to any corporation or person any right or privilege to use, manage, or control the said waters, or any part thereof, for any purpose, public or private, otherwise than by license revocable by said city at pleasure, upon notice not to exceed six months; *provided*, that this provision shall not be construed to prevent the ordinary sale and distribution of the said waters to the inhabitants of the city, or persons doing business therein, for irrigating and domestic uses, and for manufacturing purposes other than for water power.

Section 192. The said corporation shall have the right and power to construct, maintain, and operate water-works, dams, reservoirs, ditches, canals, and other means to conduct the said waters from the said river at all points between the said termini, and to supply the city and its inhabitants with water, and to distribute such water, either in zanjas, pipes, or otherwise, into, upon, and over the lands within the limits of said city. All water mains, by whomsoever hereafter laid in said city, shall be of such material and of such capacity as shall be prescribed by ordinance; *provided*, that no such main shall hereafter be laid in said city of less dimensions than four inches in diameter.

Stats. of California, 1889, p. 455.





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IN THE
Supreme Court
OF THE
United States

**LOS ANGELES FARMING AND
MILLING COMPANY, (A COR-
PORATION),**

Plaintiff in Error.

vs.

**THE CITY OF LOS ANGELES, (A
MUNICIPAL CORPORATION),**

Defendant in Error.

FILE NO. 21127

OCTOBER TERM

1909

NO. 137

REPLY BRIEF OF PLAINTIFF IN ERROR.

May it Please the Court:

Counsel for defendant in error in their brief, pages 112 to 117 (VI.) assert that in our opening brief we have not correctly stated some record facts, which we wish first to reply to:

1st. That we err in stating that the "premises in contro-

"*versy*" are stipulated to be of the value of over \$400,000, as affected in this case by decree of court. We reaffirm our statements on that subject.

What are the *premises in controversy*? They are stipulated to be of the value of over \$400,000. Tr. fol. 53, p. 22, quoted in said counsel's argument, p. 113.

The pleadings alone show what the *premises in controversy* are. In the complaint the city alleges (Tr. p. 2, III. and IV.) that the city is the owner in fee of the right to *take and use all the waters* in the Los Angeles River, etc., whenever it needs it. And (IV.) that subject to said right, the defendant in the trial court, is the *owner of the tract described* in the complaint, about 10,000 acres. And (p. 3 V.) that the defendant claims an interest in said waters in said land and the right to use the same.

There is no controversy over *anything* but the waters in, on and riparian to said 10,000 acres of land—and the value is stipulated as above to be over \$400,000.

The judgment (Tr. p. 33, fo. 76) adjudges the said waters alone to the city. The entire decree is limited to the same waters.

The answer in the trial court (Tr. p. 4, fo. 11, II. and III.) denies the city's claim to said waters.

It is stipulated (Tr. p. 23, fo. 54) that since 1901, the city *as enlarged* from its pueblo area of 17,172 acres to 27,695 acres in 1898) all of said waters were needed and used by the city.

We respectfully submit that counsel for the city is in error in the above dispute and that our contested statement is correct by the record.

As the city has by the judgment *taken* this water in *controversy* in defendant's land from the surface of the ground

to bed rock, and perpetually enjoins plaintiff in error and all claiming under it from using the same, we are damaged the full stipulated value, \$400,000. And if, as we claim, we owned the *legal* title to said waters, then the judgment has taken \$400,000 worth of our property without due process of law by condemnation and without paying therefor, all of which is violative of Sec. 1, Art. XIV. of the Constitution of the United States as assigned as error. (Tr. p. 54, Fifth Assignment, and in Tr. p. 56, fo. 130, and Eleventh Assignment of error.) The Federal question involved is now before this court.

All technical objections to the merits of the case are waived by stipulation of counsel in this case (Tr. p. 62, fo. 141), "and said record when so printed shall be used upon the hearing to determine the case upon its merits as provided in Rule 10, Sub. 9, of said court."

—————o—————

2. On p. 114 of their brief counsel disputes our statemen that "the total area to be deprived of water embraces some 800 square miles." Counsel base their argument on the stipulated map. Ex. A, Tr. p. 39. It is stipulated (Tr. p. 24, fo. 56-7, XXI. and XXII.) that the water, streams, tributaries and sources of the Los Angeles River on the public lands and Mexican grants patented to others than the city "are shown on map, Exhibit A, hereto attached, and are included in the blue lines, A-B-C-D as are also various other grants and lands."

An inspection of the map shows that it is laid off with Township lines, and that the extreme length and width in the blue lines are about seven by four Townships of six miles each, 42 miles by 24 miles, which equals 1008 square miles. Deducting some 208 square miles for fractional Townships, leaves about

800 square miles inside the blue lines, as embracing the Los Angeles River, its streams, tributaries, branches and sources.

The city in its complaint Tr. p. 1 and 2, (II., III., IV.) alleges that it owns in fee the right to *take* and use *all* the waters of the Los Angeles River, in its main stream, its branches and sources, from the surface of the ground to bed rock. And (Tr. p. 3, fo. 10) the complainant prays for a judgment that it owns in fee all of said described waters of said river "as well its branches as the main stream, and including all of the underground waters down to bed rock, from its *sources* to the southern boundary of said city of Los Angeles."

The complaint Tr. p. 1, fo. 6 (II.) also alleges that "said river takes its rise in the San Fernando Valley and in the mountains surrounding the same." And Tr. p. 24, fo. 57 (XXI.) stipulates these waters "coming from public lands of the United States, and which are the sources and tributaries of said Los Angeles River," etc.

The city in its complaint claims to be the owner in fee simple of the right to take and use all of said waters. And with that as a foundation, it claims in this case that some 10,000 acres of these lands belong to the plaintiff in error, and that the city owns all of the water in said 10,000 acres, by reason of its alleged ownership as aforesaid of all the waters of the river watershed.

The judgment of the trial court (Tr. p. 32, fo. 76) says:

"It is further ordered adjudged and decreed that said plaintiff is the owner in fee simple of the paramount right to take and use all of the waters of said Los Angeles River, (as well its branches as the main stream and *including* all of the underground waters in said land of said defendants, from the surface of the ground down to bed rock) from its sources to the South boundary of the city."

And (Tr. p. 34) perpetually enjoins defendant or successors from using or claiming said waters or *any part* thereof when the city has need thereof, and it is stipulated that the city since 1901 has needed all of said waters by reason of its increased area and population.

The State Supreme Court affirmed this judgment of ownership of all the waters within the blue lines on Ex. A, except a small area of about 39,000 acres, which the city disclaimed, leaving some 800 square miles as affected, and concluded by this judgment if affirmed by this Court, as a precedent. We therefore are sustained by the records and counsel for the city are in error as to the record.

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3. Counsel on p. 116 of their brief claim that our statement on p. 122 of our brief is outside the record.

This court takes judicial notice of its own decrees confirming many pueblo claims to present cities, also of the geographical location of such pueblos and cities on the various streams and their tributary sources and general water-shed, and of the various grants confirmed by this court as well as of the public lands on said water-sheds.

Exhibit A in this case shows many villages, and occupations, as well as the City of Pasadena, all included on this one water-shed.

If this decree stands (as a precedent) not one of that vast population has a legal right to use *any part of said water* as the city needs and has needed all of it since 1901.

Not only the defendants below directly, but every other land owner indirectly (by affirming this decree) within the blue line area (except the 39,000 acres) are legally bound hand and

foot, on their land made an absolute desert by the judgment, human being and stock legally condemned to die of thirst on the land and *perpetually enjoined* from using *any part* of said water in said land from the surface down to bed rock. Not a legal drop to quench thirst can they use.

The only parallel judgment was when Dives being in a hot arid place asked for a drop of water, and was adjudged to have no right to the use of "said water or any part thereof."

—————o—————

It is stipulated as counsel contends that the city has 200,000 inhabitants that want this water and therefore they should take from the fewer owners without condemnation by law and just compensation.

The same argument was advanced in Lux v. Hagin, and the State Supreme Court in that case, 69 Cal., p. 307-8, on issues raised therein said:

"P. 307. Taking water from private individuals for public good or public policy *is not law.*"

"The proposition is simply that by imperative necessity, the right to take or appropriate water should be held paramount to every right with which it may come in conflict."

"P. 308. That the interest of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the State should be sacrificed to the weal of the many, is a doctrine which it is to be hoped will never receive sanction from the tribunals of the country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guaranteed to him by law, and in sacrificing none, not even the most trivial to further its own interests. If the law is settled, we can not override the established rule to secure some conjectural advantage to a greater number."

Counsel further states, p. 114 of their brief, that the record does not show that this judgment "deprives or will deprive any land whatever of water."

The whole scope of the case and judgment does that very thing.

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On page 102-3 of counsel's brief they say that Woodworth v. Fulton, 1 Cal. 295, 307, quoted by us that pueblo lands were a part of the public domain, was overruled in Cohas v. Raisins, 3 Cal. 461, and other cases cited on p. 103 of their brief. But counsel failed to state that his cited cases were overruled in the subsequent cases, as to the legal title being not in the pueblo, but in the United States. The following cases show our claim to be correct: Leese v. Clark, 3 Cal. 17-27; Vanderslice v. Hanks, 3 Cal. 49, opinion on rehearing; Welch v. Sullivan, 8 Cal. p. 189, concedes that Cohas v. Raisin *is not law*."

The doctrine that the *legal* title of all Spanish and Mexican grants not segregated from the public domain, private as well as public, remains in the Federal government until the patent is issued, and that it conclusively vest the legal title in the patentee and his assigns is declared to be the law in the following cases: Biddle Bogs v. Merced M. C., 14 Cal. 279, on rehearing, p. 316-380; Young v. Howell, 14 Cal., 465; Stark v. Barrett, 15 Cal. 362; Mott v. Smith, 16 Cal., 534; More v. Smaw, 17 Cal., 199-220; Teschmacher v. Thompson, 18 Cal., 11-30; Leese v. Clark, 18 Cal., 535. Soto v. Kroder, 19 Cal., 87; Estrada v. Murphy, 19 Cal. 248, holds all non-presented claims are abandoned and become part of the public domain; Leese v. Clark, 20 Cal., 388; Clark v. Lockwood, 21 Cal., 220; Rico v. Spence, 21 Cal., 504, holds patent conclusive against a

non-presented grant either in law or equity, and reverts to public domain; Mahoney v. Van Winkle, 21 Cal., 553; Duran v. C. P. R., 24 Cal., 246; Semple v. Hager, 27 Cal., 163; McGarahan v. Maxwell, 28 Cal., 75; Hagar v. Lucas, 29 Cal., 310; Steinbach v. More, 30 Cal., 499; Merle v. Dixey, 31 Cal., 131; Ward v. Mulford, 32 Cal., 365; Stevenson v. Bennett, 35 Cal., 424, holds non-presented pueblo claims as non-existent; Bernal v. Lynch, 36 Cal., 135; Page v. Fowler, 31 Cal., 100; Yates v. Smith, 38 Cal., 60; San Francisco v. Canavan, 42 Cal., 541; Miller v. Dale, 44 Cal., 562; Brown v. Brackett, 45 Cal., 167; Chipley v. Farris, 45 Cal., 527; Gardiner v. Miller, 47 Cal., 570; Cassidy v. Carr, 48 Cal., 339; Galindo v. Wittenmyer, 49 Cal., 12; Cruz v. Martinez, 53 Cal., 239; Anzar v. Miller, 90 Cal., 342; De Guyer v. Banning, 91 Cal., 400; Los Angeles Farming and Milling Co. v. Thompson, 117 Cal., 594; Holladay v. San Francisco, 124 Cal., 352; Harvey v. Barker, 126 Cal., 262.

In a few cases the California court held the contrary, and on writ of error this court reversed the judgments.

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Counsel for the city discussing the Eighth Assignment of error on p. 55 of their brief say "it has no foundation *in the records*," and then quotes a portion of the answer—but not all of the record; and on p. 57 say:

"It is implied in the assignment of error under consideration, that the State court, either expressly or in effect, decided that these acts of the Legislature conveyed the legal title to the water right in question to the city, and were valid therefor. The record does not show that the State courts made any such

decision, or that such decision was necessary to or involved in the determination of this case."

The record shows the contrary. Counsel to maintain their case in the trial court *placed in the stipulation* of facts (Tr. p. 11, fo. 27) the full copy of the Act of the Legislature of April 4, 1850, incorporating the city. And on Tr. p. 24-5 (XXIII.) offered in evidence all the other statutes as follows:

"It is further stipulated that any court in which this action may be pending, shall take judicial notice of all statutes, private as well as public, of California, from the first session of 1850 to the present time, and including all charters and amendments to charters, approved under the Constitution of 1879 both as originally adopted and as subsequently amended from time to time so far as the same relate to or affect the plaintiff, or any municipal corporation of which it is the successor, or the said Los Angeles River or the waters thereof, as set forth in the published statutes of the State of California, the same as if set out fully herein."

These were not offered by the city to prove its corporate existence, for that is alleged in the complaint, Tr. p. 1, fo. 5 (1.) and is not denied, and is stipulated to be true, in stipulation XXV. Tr. p. 25, fo. 58. There was no issue on that matter.

But under stipulation XXVI. Tr. p. 25, we filed our written objections to the admissibility of the legislative acts, on the grounds that they were prohibited by the Act admitting California as a State, Tr. p. 27, p. 63, and were void, etc. Also in Tr. p. 28, (8) and (9) fully objected to them to wit:

"9th. That said statutes of California are null and void, and in violation of the Constitution of the United States and of said Acts of Congress *in so far as they attempt or purport to*

convey any right or title, in or to the premises and land claimed by these defendants. That the said Legislature and State of California had no title to convey, and are not shown by any evidence to have had any such title, and that the admission thereof would be violative of said Federal laws and Constitution."

These objections were overruled by the trial court. Tr. p. 29, fo. 67. We filed our bill of exceptions showing the overruling of said objection. Tr. p. 29-30, fo. 68-9, with our exceptions. We appealed to the State Supreme Court and it affirmed the order, Tr. p. 45, fo. 104, and we have brought it by writ of error and assignment of error ^{twelve} ~~eight~~, fully before this court.

The State courts by overruling our specific objection to them as conveyances to the city did rule that they were effective over our objections as such conveyances.

Our objections and assignment of error cover all said Acts from April 4, 1850, down to date.

Now counsel specially disclaim any conveying effect of these Acts in their brief, p. 60, to-wit:

"In this case the city made no claim that any of these legislative acts had the effect of transferring to it any right in the waters of the river which belonged to any other person at the time of their passage."

And on p. 61 of their brief, say:

"In this case, the city, as plaintiff, did not set up or rely upon any of these acts as a source or ground of the title asserted by it."

Counsel are now in this position, they disclaim any title from or through the United States. Brief, p. 52.

They now disclaim any right or title through the State of California.

There were but two sovereignties through which any title could come on April 4, 1850, the date of defendant's creation as a legal entity.

One was the United States, the other was the State of California. The sovereignty of Mexico ceased over two years prior to the city's existence, and it could make no conveyance. Therefore under the disclaimers of the city it had no legal title April 4, 1850. There is not left a color of a stipulation in the record giving defendant in error any *legoi* title to quiet in this action, and thus the legal title is left clear in this plaintiff in error.

Our main object in the Eighth Assignment of error was to destroy any conveying effect of said statutes as well as by our objections (in the record) to their admissibility in evidence as conveying any part of our title to the city, and thus leave this plaintiff's legal title from the United States clear of any adverse claims through said Acts.

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It would also follow from the foregoing that what the Legislature could not do, the State courts could not do.

And so far as any or all of the State court's decisions purport to convey any title, or to take away any part of this plaintiff's legal title derived from the United States they are null and void, and are the subject of our Eleventh Assignment of error.

By its decisions, substituted for legislative enactments, the State Courts in this case unlawfully cut the *estate granted by*

the patent into segments, and attempted by its judgments to convey one of those segments to the city.

This is in violation of our stipulation (XXVII.) Tr. p. 25, confining the consideration and decision of all courts to the complaint, answer and stipulated facts.

This court will observe the stipulation of facts (XXIII) Tr. p. 24-5, relating to the Los Angeles River and the City of Los Angeles are limited and restricted to those, "as set forth in the published statutes of the State of California, the same as if fully set out herein."

But the State court violated this stipulation of facts and substituted its decisions as the "general law of the *locality*" where Los Angeles city is.

No such law is "set forth in the published statutes of the State of California," neither do said court decisions appear in the published statutes of the State. They are excluded by our stipulations.

We endeavored to protect our client from all insidious judicial legislation, and to obtain a decision on the merits of law and fact.

The facts we stipulated, as well as the scope of the issues as made by the pleadings, and we also stipulated that the law should be that in the published statutes of the State of California, so far as they affect the city rights.

We have pleaded the treaty, the various Acts of Congress under which we claim and the facts applicable thereto. They make our *case on the answer*. And we stipulated that "the case made on the complaint and *answer*" shall be submitted and decided on the stipulated facts and nothing else, by either party.

The above alone has been submitted to any court and we ask a decision of this court on the case made by the complaint and answer and stipulated facts, and nothing else.



AS TO FEDERAL QUESTIONS

Replying to counsel's argument that there are no Federal questions involved.

1. As to the treaty:

Counsel say (p. 19 of their brief, last sentence: "Our contention is that the record shows no right or title of the plaintiff in error which is protected by the treaty of the Guadalupe Hidalgo," etc.

The record shows Tr. p. 5, fo. 13-17 (answer of Deft. V.) that the issue is, did the legal title pass by treaty to the United States, and thence under the subsequent Federal proceedings and U. S. patent to the plaintiff in error, all of which is fully pleaded in detail in the answer in the trial court, and is decided against by the trial court and State Supreme Court, as shown by the record, Tr. p. 30, fo. 70, and is fully assigned as error as shown by the record.

If the treaty is construed as passing the legal title to the United States of land and water, then the judgment must be reversed, for defendant in error disclaim any title from that source. See their brief, p. 52.

All the other objections of counsel to the various Federal questions under the Act of Congress of March 3, 1851, decrees and patents, by Federal tribunals thereunder, and under the Act admitting California as a State, and the Constitutional rights, all as pleaded in the answer in the trial court are substantially as the foregoing one to the treaty.

They are all fully decided against in this court as follows:

"When the highest court of a State decides against *any right claimed under a treaty* and the Constitution of the United States, the Supreme Court has jurisdiction to review the case. A case arising from or growing out of a treaty is one involving rights given or protected by a treaty."

Owings v. Norwood, 3 L. Ed. 120.

Martin v. Hunter, 4 L. Ed. 97.

"Where the claim is made to land under a treaty or authority of some officer of the United States and the claim is denied —the Supreme Court has jurisdiction to review the case."

Crowell v. Randell, 9 L. Ed. p. 458.

Cunningham v. Ashley, 14 L. Ed. 467.

Burgess v. Grey, 14 L. Ed. p. 864.

Walton v. Cotton, 15 L. Ed. 658.

Murray v. Charleston, 24 L. Ed. p. 762.

McNulta v. Lochridge, 35 L. Ed. 800.

Bushnell v. Crook, M. & S. Co., 37 L. Ed. 613.

Neilson v. Lagow, 12 L. Ed. 908.

Cousin v. Labatut, 15 L. Ed. 601.

Irvine v. Marshall, 15 L. Ed. p. 996-998.

Berthold v. McDonald, 16 L. Ed. 318.

U. S. v. Fassett, 16 L. Ed. 186-7.

Carondalet v. St. Louis, 17 L. Ed. 105.

Maguire v. Tyler, 17 L. Ed. 137.

Minnesota v. Batchelder, 17 L. Ed. 551.

Silver v. Ladd, 18 L. Ed. 828.

Pumpelly v. Green Bay & M. Canal Co., 20 L. Ed. p. 562.

Glasgow v. Baker, 32 L. Ed. 513.

Pickering v. Lomax, 36 L. Ed. 716.

Shively v. Bowlby, 38 L. Ed. 331.

"And generally a decision of a State court against the validity of an authority set up under the United States by defendants in an action of *trespass to try title*, so far as it involves the decision of a question of law, presents a question for review, whether the question depends upon the *Constitution, laws, or treaties* of the United States, or upon the *local law* or upon principles of *general jurisprudence*."

Stanley v. Schwalby, 40 L. Ed. 960.

Chicago B. & Q. R. Co. v. Illinois, etc., 50 L. Ed. 596.

West Chicago St. Ry. Co. v. Illinois etc., 50 L. Ed. 850.

"It is not material whether the invalidity of a title was decided upon a question of *fact or law*, if the title was rejected."

Lytle v. Arkansas, 16 L. Ed. 306.

"That a proper construction of the survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents, raises a Federal question."

French-Glenn L. S. Co. v. Springer, 46 L. Ed. 800.

Kean v. Calumet C. & S. Co., 47 L. Ed. 1134.

Hardin v. Jordan, 140 U. S., 371.

"A refusal to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives the Supreme Court jurisdiction to review.

Des Moines Nav. & R. Co. v. Iowa H. Co., 31 L. Ed. 202.

Where a title or right or privilege or immunity on which

recovery depends, will be defeated by one construction of the Constitution, or a law of the United States, or sustained by the opposite construction, raises a Federal question for this court.

Carondelet v. St. Louis, 17 L. Ed. 102.

Starin v. New York, 29 L. Ed. 388.

Missouri, K. & T. R. Co. v. Haber, 42 L. Ed. 878.

Chicago, B. & Q. R. Co. v. Illinois etc., 50 L. Ed. 604.

In the case at bar the State court refused to give due force and effect or any force or effect whatever to the decree of the Federal Board of Land Commissioners (Tr. p. 18, fo. 43) and pleaded as a defense and as *res adjudicata* (Tr. p. 8, fo. 20), and denied by the State courts, Tr. p. 30, fo. 70 (III.) and duly assigned as the third error (Tr. p. 53, fo. 123).

This also raises a Federal question for this court to decide.

Dupasseur v. Rochereau, 22 L. Ed. 588.

Central Natl. Bank v. Stevens, 42 L. Ed. 807.

Deposit Bank v. Frankfort, 48 L. Ed. 276.

National F. & P. W. v. Oconto W. S. Co., 46 L. Ed.
157.

In fact the plain provisions of the Judiciary Act are so literally complied with in this whole case, that citations of authorities for or against Federal questions are superfluous; and counsel stipulate that the case shall be heard in this court on the merits. Tr. p. 62, fo. 141.

REPLY ON THE MERITS

It is admitted by the pleadings and stipulation of facts that only the *legal title* is involved to certain "*real property*" consisting of all the waters in, on, or riparian to, the land of plaintiff in error, from the surface of the ground down to bed rock, and that said *legal title* was formerly in the Republic of Mexico and Kingdom of Spain.

Defendant in the trial court sets up as a defense in proper and sufficient allegations (not even demurred to) as follows:

1. That this legal title passed by the treaty to the United States.
2. That by its Federal jurisdiction proceedings, decrees, survey and patent, under the provisions of the Act of Congress of March 3, 1851, to ascertain and settle the claims to lands in California that the title of the United States was quieted against any adverse claim of defendant in error.
3. That the subsequent patent of the United States passed that legal title to the patentee and assigns, "without any reservation or exception whatever of the waters of the Los Angeles River," and it is stipulated that the title of the patentee is now vested in plaintiff in error, Tr. p. 22, fo. 51-2 (XII. and XIII.)

Plaintiff in error claims that a proper construction of said treaty, Acts of Congress and Federal decrees and patents and stipulation vested the legal title in plaintiff in error, to the land and water riparian thereto as part and parcel of the land.

4. Being thus vested with the *legal title* from the United States plaintiff in error pleaded in its said answer that the act admitting the State of California prohibited the State by its Legislature, Courts, or otherwise, from interfering with or calling in question said disposal of the legal title to plaintiff

in error, and pleads in its answer that the various statutes of the State purporting to take that title, and transfer it to the City of Los Angeles are unconstitutional and void. And that such taking the title (valued at \$400,000) without the statutory proceedings of condemnation and just compensation was violative of the United States constitutional provisions requiring due process of law and just compensation.

5. That under the land laws and decisions of the United States and State of California, the riparian rights to the proper use of the waters in, on, and riparian to, said land, was a part and parcel thereof, and passed with the decrees and patent of the Federal Government, to plaintiff in error.

6. The Legislature of California having no power to transfer this legal title to the city, the State Supreme Court attempted to do what the State and the Court were both prohibited from doing.

(a) By construing the treaty, Acts of Congress, decrees and patents of the United States as not having any jurisdiction, effect or validity in the case. Tr. p. 30-31.

(b) By disregarding the stipulation of counsel that "the case made on the complaint and answer should be decided on the stipulation of facts without any further evidence by either party, and that the stipulation was irrevocable." And by substituting the State Supreme Court's supposed knowledge of the facts in the case of Lux v. Haggan and other cases, for the stipulated facts in this case, said court having only appellate jurisdiction, and no original jurisdiction, and was prohibited by the stipulation submitting the case. Thus was denied to this plaintiff in error a trial by due process of the laws of the State of California. All of which was error arising for the first time in the opinion and decision of the State Supreme

Court. It is the subject of the Eleventh Assignment of error, and is properly before this court.

Egan v. Hart, 41 L. Ed. 680.

Sayward v. Denny, 39 L. Ed. 943.

Mallutt v. North Carolina, 45 L. Ed. 1015.

This Supreme Court though bound by an agreed stipulation of facts, when reviewing the judgment of a State Court, may inquire whether the facts agreed upon support the judgment rendered.

Kelley v. Rhoads, 47 L. Ed. 361.

McCollough v. Virginia, 43 L. Ed. 382.

Counsel for the city apparently recognizing this jurisdiction of this court begin their argument by quoting (on p. 17 of their brief) stipulation of facts (III.) Tr. p. 10, fo. 26, that "*Under the laws* of the kingdom of Spain said pueblo upon its foundation, *by virtue of grant under such laws*" had such right to use the waters, etc., and that right continued to exist under the Mexican Government "until the acquisition of California by the United States.

In More v. Stenbach, 32 L. Ed. 51, this Court said: "The laws of the former government relating to the public domain ceased at that time" (July 7, 1846, the date of the American occupation). Congress extended the Federal laws over California by Act of September 29, 1890.

Counsel for the city assert that the legal title *passed* from the pueblo to the city at the date of its incorporation, April 4, 1850. What *passed* it?

There is no stipulation that the legal title was ever vested in the pueblo, or that it passed to plaintiff in error. The nature and duration of the grant are not stipulated.

The grant *under the laws* of the kingdom of Spain had the limitations fixed by *those laws*, to-wit, the *legal title* (the only subject of this action) remained in the King, and no law or ordinance of Spain ever changed it.

This court said, in U. S. v. Sandoval, 42 L. Ed., on p. 174:

"The fee of the land within the limits of pueblos continued to remain in the sovereign, and *never* in the pueblo as a corporate body. Subsequent decrees, orders and laws did not change the principal."

We did not stipulate that the pueblo had a grant in violation of such laws, but such a grant as the laws allowed, and as this court above decided, as well as in all pueblo land in the ceded territory—the legal title remained in the sovereign.

It is also shown by the stipulations that the pueblo lands had never been segregated from the Mexican Public domain. Tr. p. 13, fo. 31; and Tr. p. 17, fo. 41.

All the decisions of this court in all Mexican grant cases, as well as in all pueblo cases, decide that until final segregation by the sovereign, survey and patent, that the legal title remains in the United States, and passed by the patent to the patentee and no other person (see opening brief, p. 61 to 64.).

The stipulations further show (Tr. p. 12, fo. 30) the city claims under the laws of Spain and *particularly under the plan of Pitic*, (a copy and translation of which were attached to the city's petition) to the Federal Board of Land Commissioners.

The stipulations further show (Tr. p. 13, fo. 33) that so much of the said document as is considered material is in the stipulated abstract thereof, Tr. p. 14, fo. 35 (VIII.)

Sec. 7 of said Plan of Pitic relating to water grants to

pueblo appears (Tr. p. 15, fo. 36) which shows that the legal title remained in the King, to-wit.:

"The neighbors and natives shall likewise enjoy the use of the woods, waters, and other benefits from the Royal and vacant lands lying *outside of the tract assigned to the new town jointly with the residents and natives of the immediate and adjoining towns*; which favor and right shall continue *until* by His Majesty the same shall be *granted or alienated*; in which case regulations will be made according to the provisions for concessions in favor of the new possessors or proprietors."

This shows that the *legal* title and right to dispose of the waters was vested in the King and not in the pueblo.

Speaking of pueblo rights, this court said, in U. S. v. Sante Fe, 41 L. Ed., on p. 887: "To all of which rights the United States succeeded as successor of the King of Spain and the Government of Mexico."

The stipulated grant only continued as stipulated (Tr. p. 10, fo. 26) "*until* the acquisition of California by the United States.

At that date of the Treaty, February 2, 1848, the *legal* title was by the treaty vested in the United States and never was in the pueblo.

The defendant in error did not then exist, and could take no title. Defendant in error was created April 4, 1850 (Tr. p. 11, fo. IV.) over two years after the date of the treaty.

Where was the legal title vested during these two years of interregnum? In the United States, and nowhere else.

Counsel for plaintiff in error disclaim any title from the United States. Brief of counsel, p. 52.

The city alleges in its complaint that at the *date of its organ-*

ization (April 4, 1850) two years after the treaty that it owned this legal title.

Where is the conveyance that passed such title to the city (dated on or about April 4, 1850, or any other date) in this stipulated record. There is no such conveyance stipulated in the record of this case. There is none from the Pueblo, none from the United States. The burden of proof is on the city to produce such a conveyance in the trial court.

Counsel for the city on p. 36-7 and 86 of their brief, attempt to produce such a conveyance, if any, as follows:

"By the earlier Act of the Legislature of California of April 4, 1850, set up in the record, incorporating the City of Los Angeles, it was provided that the city should succeed "to all the rights, claims and powers of the pueblo of Los Angeles in regard to property."

There is not another document in the stipulated record even purporting to convey any color of title to the city at the date of its incorporation, April 4, 1850.

That act was utterly null and void as a conveyance of the *legal* or any other title or color of title of the premises in controversy.

This court said in *Devine v. Los Angeles City*, 50 L. Ed. 1054, that the State of California was not in line of these titles and that the Act would convey no title. The authorities are fully shown on p. 71-5 (our opening brief) where our *Eighth* assignment of error deals with these statutes, void as conveyances.

Counsel for the city, and the State Supreme Court, have never been able to point out any facts in the stipulation constituting a conveyance to the city at the date of its incorporation, April 4, 1850, except said void Act of the Legislature.

Both counsel and the court say the title of the pueblo *passed* to the city at the date of its incorporation. City counsel's brief, p. 58, 61, 62.

What document or fact in the record passed it? None in the record.

The State Supreme Court attempted to supply the missing link by saying the U. S. patent, under which plaintiff in error holds, was modified by the *State* law on riparian rights. This is dealt with in our *Fifth* assignment of error, p. 48 to 61 (our opening brief) and shows under the common law adopted by the State and by repeal of all conflicting laws by statute of April 22, 1850, quoted p. 95 of our opening brief that the patent passed equal riparian rights to the patentee.

The State Supreme Court then changed its wording "general law of the *State* where the land is situated" Tr. p. 42, fo. 98 (which is the common law) to "general law of the *locality*," applicable to the pueblo.

There is no such law on the statute books of the State of California, except the void Legislative Acts hereinbefore treated of in the *Eighth* assignment of error, p. 71, our opening brief.

But the State Supreme Court then proceeds to create a "general law of the *locality*, *out of its own former decisions*, Lux v. Haggin, and others, and made those decisions the *local law transferring this title to the city*. It also substituted the facts of those cases as known to the court for the stipulated facts of his case. This was judicial legislation and is not found in any Act passed by the State Legislature, and are excluded from this case by stipulation as hereinbefore shown.

These errors are made the subject of our *Eleventh* assignment of error, p. 89 to 113 in our opening brief.

This court in *Botiller v. Dominguez*, 32 L. Ed. 926, said: "No Mexican or Spanish grant title is valid unless submitted to and confirmed under the Act of 1851;" and "that all claims, perfect or imperfect, must be presented, and if not so presented are thereby abandoned and become a part of the public domain."

This case was quoted and affirmed in *Barker v. Harvey*, 45 L. Ed. 963, on a claim involving the same principles as the city's claim in this case.

The State Supreme Court says the Pueblo Grant title did not have to be presented under the Act of March 3, 1851, and that it was not presented but *passed* to the City of Los Angeles.

Does this decision of the State Supreme Court overrule the above decisions of this Federal Supreme Court, or vice versa? Which is the law? Did this "abandoned" grant title pass to the city or to the "public domain?"

Our case is stronger. We claim that the stipulations (Tr. p. 10 to 18, fo. 26 to 44) show that it was presented fully and rejected by decree of the Commissioners (Tr. p. 18, fo. 43-4) and it is stipulated—Tr. p. 10, fo. 26 (111 1-2)—that it was *never confirmed or otherwise presented*. We claim that the unlimited Federal legal title which passed by its patent in this case can not be diverted from the patentee, in whole or in part, and given to the city by any State law or decisions of the State courts, except upon due process of law by condemnation and just compensation therefor.

Counsel for the city claim, on p. 110 V. of their brief, that if the premises in controversy were submitted to the Federal Board of Land Commissioners, that it was confirmed by the *decrees and patent* for the pueblo lands.

The direct contradictory of this statement is stipulated in this case. The decree appears (Tr. p. 18, fo. 43) to-wit.:

"The mayor and common council of the City of Los Angeles v. the United States.

"In this case on hearing the proofs and allegations, it is adjudged by the Commissioners that the claim of the said petitioners is valid for the land hereinafter particularly mentioned and described, and it is therefore decreed that the same be confirmed to them; and as to the remaining portion of the premises described and claimed by them in their petition to the Commissioners, it is adjudged that their claim is *invalid, and their application for a confirmation thereof is therefore rejected.*"

The decree then describes the four square leagues confirmed.

A more complete rejection could not be expressed in any record.

It is also stipulated in this case, Tr. p. 10, fo. 26 (III. 1-2) that the claim was never confirmed or presented except as above. The same decree it copied in the city patent (Tr. p. 19, fo. 45). And it is stipulated (Tr. p. 22) that the city patent does not "embrace any of the lands of the defendant, described in the complaint or answer herein." And it is further stipulated, Tr. p. 23, (XV.) that the rancho (of plaintiff in error) "is situated some ten miles above the City of Los Angeles, on said river, and above any of the points of diversion of water by said city."

Therefore the city, in view of the above facts, stipulated as controlling this case, and excluding all outside matters, is conclusively bound and estopped from claiming that the city's claim was "confirmed by said Federal decree or patent."

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To avoid the effect of the Act of March 3, 1851, counsel for the city on p. 85, 86, 87, of their brief, assert: "That the property to which the city asserts title is 'incorporeal,' 'intangible,' 'impalpable thing' in character, and therefore not within the purview of the Act of March 3, 1851."

Counsel and the city are estopped by the stipulated records of this case from any such assertion.

The city's complaint (Tr. p. 3, fo. 9, V.) alleges the subject in controversy to be "said *real property*, so owned by this plaintiff" (the city) and reasserts it. Tr. fo. 10.

It is so alleged (as said *real property*) in the answer, Tr. p. 4, fo. 12 (IV.) and so treated throughout the answer. And stipulation (XXVII.) Tr. p. 25, fo. 59, says: "*the case made* on the complaint and answer, shall be *submitted* and *decided* on the foregoing stipulation of facts without any further evidence on its part of either party, and such stipulation of facts is hereby made irrevocable."

The stipulated pueblo grant is not for any such *incorporeal*, *intangible*, *impalpable thing*. It is stipulated to be for the premises claimed by the plaintiff in the complaint, alleged to be *real property*.

There is not an allegation in the complaint, answer or stipulation that the premises in this case are "incorporeal," "intangible," or an "impalpable thing," so as to evade the Act of Congress of March 3, 1851, and the city and its counsel are bound by their pleadings "*irrevocably*."

In protection of our client's title we refuse to consent to the city's changing the "case made by the complaint and answer" from "said real property," to "incorporeal, intangible, impalpable property" in order to evade the Act of March 3, 1851.

—————o—————

In this case we claim that the legal title of the water as a part and parcel of the land was vested originally in the King of Spain, that it passed to the Republic of Mexico, and passed by treaty to the United States as a part and parcel of the lands ceded—that all former laws ceased and were supplanted by the laws and sovereignty of the United States—that by the proceedings, decrees, and patents of the United States, stipulated in the record, all shadow or color of adverse claim was extinguished, and a clear and quiet legal title vested in the United States—and by its decrees and patents the legal title passed to the patentee and by stipulation is now vested in plaintiff in error; and that the efforts of the State Legislature and State supreme Court to transfer this vested title to the city, are unconstitutional and void, and that the court had no authority to disregard the stipulated facts and substitute other facts as the basis of its decision. We claim that neither the city, its counsel, or the State courts had or has any power or right to substitute any "*incorporeal, intangible or impalpable thing*" in this record in place of the stipulated *real property* in order to evade the Act of March 3, 1851. That is not due process of law.

These are all Federal questions determinative of the case. The State courts decided against all of them. They are pleaded as a defense in the case and appear in the State Su-

preme Court's opinion and decisions. They are clearly and fully assigned as error for this court to decide.

The argument of counsel for the city and their authorities cited only apply where *no Federal questions were raised, or decided against by the State courts*, and do not apply here where Federal questions were raised in, and decided against, by the State Court, and for that reason we have not specially discussed them.

We claim that the Federal Constitution, laws, and treaties, as defined by this court, are the supreme law of the land and of this case, anything in the State constitution, laws, or decisions to the contrary notwithstanding.

The Federal adjudications have covered every point in these Spanish and Mexican grant titles, as decided by this court in the case of *Brown v. Brackett*, 22 L. Ed., p. 623, said:

"After the full and elaborate consideration which has heretofore been given in this court, in the numerous cases before it, to Mexican grants in California, we do not feel called upon to say more as to the effect of a confirmation of claims under them. Every conceivable point respecting these grants, their validity, their extent, and the operation of decrees confirming claims to land under them, has been frequently examined, and the law upon these subjects has been repeated, even to weariness."

We respectfully submit the case to this court on the record calling the attention of the court to the *irrevocable* stipulation of counsel, Tr. p. 25, fo. 59 (XXVII.) that, "the case, *made on the complaint and answer shall be submitted and decided on the foregoing stipulation of facts, without any further evidence on the part of either party*, and such stipulation of facts is hereby made irrevocable." And the further stipulation made in this court (Tr. p. 62, fo. 141, as to printing the record,

to-wit,: "And said record when so printed shall be used upon the hearing to determine the case upon *its merits*, as provided in Rule 10, Sub. 9, of said court."

Such a decision by this court will terminate the sweeping and oppressive litigation precipitated by the City of Los Angeles against the many riparian owners, one of which alone is against some 150 defendants, and is now on its way to this court.

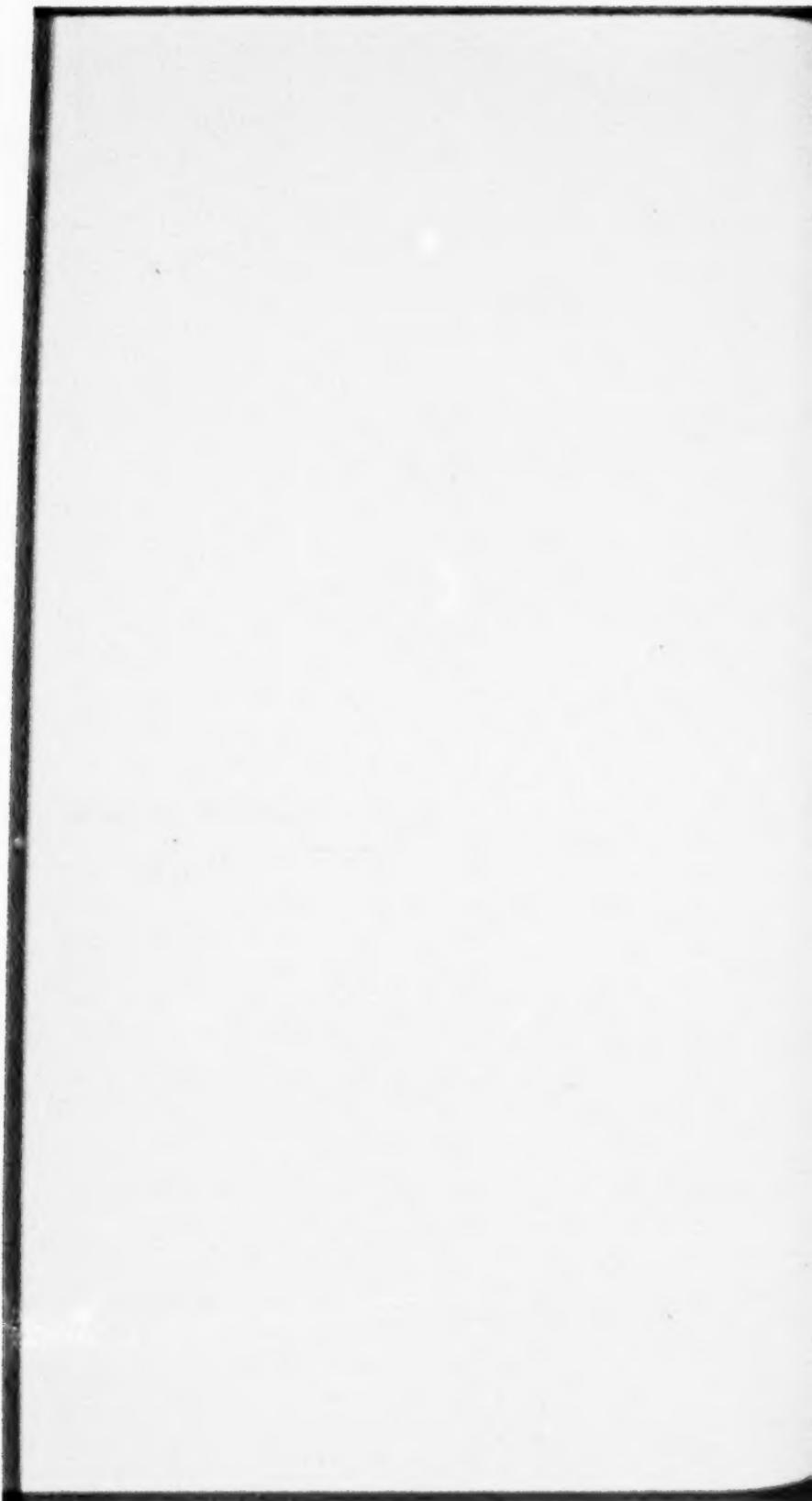
RESPECTFULLY SUBMITTED,

R. M. WIDNEY,

Counsel for Plaintiff in Error.

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IN THE
Supreme Court
OF THE
United States

**Los Angeles Farming and
Milling Company, (a cor-
poration),**

Plaintiff in Error,

vs.

**The City of Los Angeles, (a
municipal corporation),**

Defendant in Error.

File No. 21127

Term No. 724

October Term
1907

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF WRIT OF ERROR.

This case is brought by writ of error to the Supreme Court of the state of California, to review a judgment of that court, in favor of the defendant in error, entered January 23d, 1908, affirming a judgment of the Superior Court of the county of Los Angeles, entered on the 17th

day of August, 1906; also affirming an order of said Superior Court overruling certain objections to the admissibility of certain stipulated facts; also affirming an order of the said Superior Court denying the motion of plaintiff in error in the trial court to set aside the said judgment and enter up judgment for this plaintiff in error, in accordance with the stipulated facts on which the case was tried and submitted, dated August 10, 1906.

The judgment of the Supreme Court of California is on pages 40 to 45 of the transcript of the record; the judgment of the Superior Court is at pages 33 to 35, and the order overruling the objections to certain stipulated facts is at page 29, fol. 67, and the order denying the motion of plaintiff in error in the trial court to set aside the judgment and enter up judgment for this plaintiff in error in accordance with the stipulated facts on which the case was tried and submitted, is entered at page 38, fol. 87.

The writ of error was allowed by the chief justice of the Supreme Court of the state of California on the 9th day of April, 1908. [Tr. p. 49.]

The assignment of errors was filed with the clerk of the state Supreme Court the 10th day of April, 1908. [Tr. p. 57.]

The writ of error was issued the 9th day of April, 1908, by the clerk of the United States Cir-

cuit Court, Ninth Circuit, Southern District of California, and was filed with the clerk of the Supreme Court of the state the 10th day of April, 1908. [Tr. p. 60.]

The regular bond was duly approved and filed the 10th day of April, 1908. Citation was issued on the 10th day of April, 1908, and service of the same accepted on the 10th day of April, 1908, in the city of Los Angeles, California, by the attorneys for the defendant in error. [Tr. p. 57.]

The transcript and appearances of counsel for both plaintiff and defendant in error were filed with the clerk of the Supreme Court of the United States, April 21, 1908. [Tr. p. 62.]

General Statement of the Nature of the Action.

This was a suit brought in the Superior Court of the state of California, in and for Los Angeles county, by The City of Los Angeles (as plaintiff below), defendant in error herein, against the Los Angeles Farming and Milling Company (as defendant below), plaintiff in error herein, under sec. 738 of the Code of Civil Procedure of the state of California, to quiet title; the section is as follows:

“Sec. 738. An action may be brought by any person against another who claims an estate or interest in *real property*, adverse to him, for the purpose of determining such adverse claim,” and under Sec. 17, Sub. 2, of the same code as fol-

lows: "Sec. 17, Sub. 2: The words 'real property' are co-extensive with lands, tenements, and hereditaments."

In this state the action is only maintainable upon the *legal title*, to real property, such as must be conveyed by deed.

"If it is not real property, this action cannot be maintained, for no action will lie in this state to quiet title to personal property. * * * In actions of this character the plaintiff must establish a *legal title*, as distinguished from a mere *equitable title*. * * * Being real property, the interest sued for could be conveyed only by deed."

Fudicker v. East Riverside Irr. Dist., 109 Cal. 389.

The word deed of course covers any conveyance provided by law.

Statement of the Pleadings---The Complaint.

Pursuant to said law, the city of Los Angeles (as plaintiff below) filed its complaint alleging: That it is a municipal corporation organized under the constitution and laws of this state [Tr. fol. 5]. (Admitted.)

That the Los Angeles river is in Los Angeles county, Cal., and takes its rise in the San Fernando valley and surrounding mountains, and flows for several miles from its sources on public lands, until it reaches the northern corporate boundary of the city, and thence through the city.

That said river throughout its stream and branches consists of a surface, and underground stream, and that such underground stream extends throughout the whole of the lands of the defendant, in the complaint and answer described, from the top of the saturated or water plane down to bed rock, and that all the underground waters in said lands, *from the surface of the ground* down to bed rock, are a part of said river [Tr. fols. 6-7, p. 1-2]. (Admitted.)

That said city of Los Angeles

"Is now and every since its organization has been the owner in *fee simple* of the paramount right to *take* and *use* all of the waters of said river (as well its branches as the main stream, and including the underground waters as well as the surface waters of said river) from its sources to the southern boundary of the city, for municipal purposes, within the limits of said city of Los Angeles as the same might have existed or *may exist at the time of such taking or use.*" [Tr. fol. 7, p. 2.] (Contested.)

That subject to said ownership the defendant in the trial court owns a tract described by metes and bounds (some 10,000 acres), being a part of the Rancho Ex Mission San Fernando. [Tr. fol. 8.] (City ownership denied.)

That said defendant claims an interest in said "*real property*, so owned by said plaintiff" adverse thereto, to use said waters on its said land. [Tr. fol. 9.] (Admitted.) And that said defendant

has not any estate, right, title or interest in or to said waters or any part thereof save in subordination to the paramount right of said plaintiff to *take and use all* of said waters when the city needs it. [Tr. fol. 9.] (Contested.)

And prays judgment that said defendant be required to set forth the nature and extent of its claims or interest in said "*real property so owned* in fee simple by said plaintiff," and for the usual decree to quiet the title thereto. [Tr. fol. 10.]

Answer of Plaintiff in Error as Defendant Below.

This plaintiff in error, as defendant below answered, denying the ownership of the plaintiff below (defendant in error) [Tr. fols. 11-12.] And also sets out the nature and extent of its claim and alleged in defense: That it owned in fee simple and had the actual and exclusive possession and use of the premises in controversy for over fifty years, claiming the same under conveyance and judgments hereinafter set out. [Tr. fols. 12-13.] That the value of the premises was over \$500,000, and that its lands are some ten miles above the city on the river. [Tr. fol. 13.]

The answer further alleged that the *legal* title was originally in the crown of Spain, and passed to the republic of Mexico, and that said republic of Mexico on June 17, 1846, granted the premises in controversy to the predecessors in interest of

said defendant (plaintiff in error). [Tr. fol. 13.]

That by the treaty of Guadalupe Hidalgo of February 2, 1848, the *legal* title of the premises passed to the United States as a part of the territory ceded by the treaty and that the rights and title of the Mexican grantees and their successors (the defendant in the trial court) were protected by the treaty. [Tr. fol. 14.]

The answer alleges that the act of congress of September 9, 1850, admitting California into the union prohibited the state by its legislature or otherwise from doing any act whereby the right of the United States to dispose of said land, or its title thereto, should be impaired or questioned. [Tr. fol. 14.]

And that the laws of the United States were extended over the state of California September 29, 1850, by act of congress of that date. [Tr. fol. 14.]

And that congress on March 3, 1851, passed an act to ascertain and settle private land claims derived from Spain or Mexico in the state of California, requiring that all persons claiming lands in California by virtue of *any right* or *title* derived from the Spanish or Mexican government shall present them to the land commissioners therein provided for. [Tr. fol. 15.]

And that all lands the claim to which have been rejected, or have not been presented shall be deemed held and considered as *part of the public*

domain of the United States. [Tr. fol. 15, p. 6.]

And that the claim of towns or cities should be presented under said act. And that a grant to cities or towns existing July 7, 1846, should be presumed. [Tr. fol. 16.] And that the decrees and patents issued by the tribunals under said act should be conclusive between the United States and the claimant. [Tr. fol. 17.]

That the predecessors in interest of the plaintiff in error presented their aforesaid Mexican grant to said tribunals under said act and that said tribunals duly confirmed the same and the United States duly issued its patent therefor January 8th, 1873, and that by virtue of said confirmation and patent the *legal* title to the premises in controversy vested in the predecessors of this plaintiff in error and that said land is some ten miles above the corporate limits of the city. [Tr. fol. 17-18.]

That while said case was pending before said commissioners, the city of Los Angeles did not contest the same as provided in Sec. 13 of said act. [Tr. fol. 18.]

The answer pleads said proceedings, decrees, and patent as *res adjudicata* and as a bar and as an estoppel to the present claim of the city. [Tr. fol. 18.]

The answer further sets out that the claim of the city for land and water was presented to said land commissioners as re-

quired by said act of congress in connection with its claim for sixteen square leagues of land and not otherwise was it presented under said act and that all the claims of the city to land and the waters were rejected as invalid, except for four square leagues of land, and that the United States duly issued its patent to said city containing a copy of said decree rejecting the claim of said city to all of the premises claimed except the said four square leagues of land, and that said decree and patent were conclusive against the city, and that thereafter it had no claim or right to any premises outside of its said patent. And the answer pleads said decree and patent as *res adjudicata* and a bar and as an estoppel herein. [Tr. fols. 19-21.]

The answer further alleges that the sources and tributaries of the said Los Angeles river are located on the public lands of the United States, and that the *legal* title thereof is vested in the United States, and not in the plaintiff in the trial court, and that said waters flow upon the defendant's land (plaintiff in error) from time immemorial. [Tr. fol. 22.]

The answer also alleges that certain acts of the legislature of the state of California purporting to grant and convey the premises in controversy to the city of Los Angeles, are null and void under the act of congress admitting California to the Union, and under Art. XIV, Sec. 1, of the consti-

tution of the United States prohibiting private property from being taken for public use, except by due process of law and upon just compensation therefor. [Tr. fols. 22-23.]

And the answer claims the right to use the waters in, on or riparian to its said lands vested in said defendant, below, by the patents, decrees and acts of congress aforesaid, by reason of said waters being a part and parcel of said lands and having been vested by said patents, decrees and acts of congress aforesaid [Tr. fol. 23], and also pleads the statute of limitations. [Tr. fol. 23.]

And prays for relief accordingly.

The federal questions are raised by the aforesaid answer filed in the trial court by plaintiff in error, as defendant below.

Stipulation Submitting the Case.

The case was submitted to the trial court on a stipulation of facts, wherein is the following stipulation submitting the case, to-wit:

“XXVII.”

“It is further stipulated that, in consideration of the disclaimer by the plaintiff of any interest in the lands described in the amended cross-complaint herein, the case, made on the *complaint and answer, shall be submitted and decided on the foregoing stipulation of facts without any further evidence on the part of either party,* and such stipulation of facts is hereby made *irrevocable.*” [Tr. fols. 59, p. 25.]

Stipulation of Facts as to the City.

The stipulated facts are briefly stated as follows, as to the title of the city defendant in error, to-wit:

That a pueblo was established by the governmental action of the authorities of the kingdom of Spain in 1781, being for four square leagues, and on the present site of Los Angeles city and as subsequently patented by the United States. That a settlement was made of some twelve settlers, and water taken out of the river by ditches *within the four square league limit*, for use within the same limits. Also *at the same time*, by virtue of a *grant under such laws* of the kingdom of Spain the pueblo had a right to the use of the waters now claimed by the city of Los Angeles in this case, and that said *grant* continued down "*until the acquisition of California by the United States.*" [Tr. fols. 25-6.]

This date of acquisition was by conquest July 7, 1846, and by treaty date February 2, 1848.

There is no stipulation of fact that said grant continued or existed *after that date*, and there is no stipulation of fact of any conveyance of that right or grant to the defendant in error herein, the city of Los Angeles, which was incorporated April 4, 1850, over two years after the date of the treaty, and it had no corporate existence prior to that date. [Tr. fols. 27-8.]

It is further stipulated that the city of Los

Angeles, on October 26, 1852, presented said grant of said waters of all of the Los Angeles river to the land commissioners under the act of congress of March 3, 1851, to ascertain and settle the private land claims in California, in the manner it was presented in connection with the *original and contemporaneous* grant of the pueblo lands, as set out in the proceedings before the land commissioners and patent thereunder, and that it was *not presented in any other manner.* [Tr. fols. 26-7.]

The judgment roll, or record, in said proceedings before the land commissioners, was stipulated as facts in this case, to show the presentation and action of the government on said grants claimed by the city of Los Angeles, showing the petition of the city and the evidence to support it [Tr. fols. 28-39]; also the opinion or finding of facts of the commissioners [Tr. fols. 40-43], and final decree of the commissioners, rejecting as invalid the claim of the city for everything except four square leagues of land. [Tr. fol. 43.]

The petition of the city alleged the state act of incorporation of April 4, 1850, and "that it should succeed to all rights, claims and powers of the pueblo de Los Angeles in *regard to property.*" [Tr. fols. 28-9.]

Also that the city of Los Angeles claims "in virtue of the general laws of Spain and particularly of an ordinance of his majesty the king of

Spain, wherein he provides for the establishment of the town of Pitic, in Sonora, and orders that the provisions relative thereto should be *followed in founding pueblos in the department of California,*" translations of which were attached.
[Tr. fol. 30.]

Also the order of Governor Philipe de Neve of 1781 and of Governor Fages of 1786, also the act of the Mexican congress of 1835. [Tr. fol. 30.]

Also alleges "that all lands in the neighborhood are subject to the city claim and have always been so granted and held." [Tr. fol. 31.]

Also, that no judicial possession or segregation of the pueblo property had ever been made by Spanish or Mexican authority. [Tr. fol. 31.]

And that there are no conflicting claims to the same either in virtue of title or possession. [Tr. fol. 32.]

And that the city relies on such documents and such other testimony as it may introduce. [Tr. fol. 32.]

The documents relating to the city and water rights are stipulated as facts. [Tr. fols. 33-39.]

The seventh section of the Plan of Pitic, which is the specific origin and extent of the city's water claim as presented to the commissioners is in the following words:

"7th. The *neighbors* and natives shall likewise enjoy the use of the woods, *waters*, and other benefits from the royal and vacant lands *outside of*

the tract assigned to the new town jointly with the residents and natives of the immediate and adjoining towns; which favor and right shall continue until by his majesty the same shall be granted or alienated; in which case regulations will be made according to the provisions for concession in favor of new possessors or proprietors.” [Tr. fol. 36.]

Other detail as to use of ditches and water are set out fully in Secs. 13 to 21. [Tr. fols. 33-39.]

The commissioners made an opinion, or finding of facts on the city's claim, stipulated as a fact herein, wherein the commissioners find, “No foundation is laid by the evidence for presuming the assignment to the city beyond the four square leagues given by law.” [Tr. fol. 42, p. 18.]

The final decree of the commissioners was entered February 5, 1856. [Tr. fols. 43-4.]

The decree confirms the claim of the city for four square leagues of land, and adds:

“And as to the remaining portion of the premises described and claimed by them in their petition to the commissioners it is adjudged and decreed that their claim is invalid and their application for a confirmation thereof is therefore rejected.” [Tr. fol. 43.]

The stipulation of facts states that pursuant to said decree, the United States patent was duly issued to the city of Los Angeles, August 9, 1866, containing in the patent a copy of said decree rejecting the city's claim for everything outside of the four square leagues. [Tr. fols. 44-5.]

This patent by Sec. 15 of the act of congress of March 3, 1851, to ascertain and settle the private land claims in California became conclusive between the United States and the claimant, the city of Los Angeles, defendant in error herein. And all real property outside of that patent became a part of the public domain, so far as the city of Los Angeles was concerned.

A second patent was issued in the same form August 17, 1875 [Tr. fol. 50], to which neither party attaches any consequence in this case.

It is stipulated as a fact that:

“Neither of said patents embraces any of the lands of the defendant, described in the complaint or answer herein.” [Tr. fol. 51, p. 22.]

The foregoing embraces all of the stipulated facts on the part of the city of Los Angeles as to the proceedings before the land commissioners under the act of congress of March 3, 1851, to ascertain and settle the private claims to land in California, relating to the grants from the Spanish and Mexican government under which the city claimed.

Stipulation of Facts as to the Title of the Plaintiff in Error.

These are shown [Tr. fols. 52-3], and are briefly as follows:

The Rancho Ex Mission de San Fernando was

an inchoate grant from Mexico, June 14, 1846. Was duly presented to and confirmed by the board of land commissioners and tribunals as required by the said act of congress of March 3, 1851; and a patent therefor duly issued in usual form by the United States January 8, 1873. Said patent includes some 121,619 acres through part of which the said Los Angeles river and its tributaries flow, and said rancho is raparian to said river; and the patent

“Grants the land therein embraced with the appurtenances, and *without making any reservation or exception of any rights to said river or its sources or tributaries or of the waters thereof.*” [Tr. fols. 52-3.]

It is further stipulated as a *fact*,

“That said patent embraces the land claimed and *owned* by said defendant, the Los Angeles Farming and Milling Company, herein described in the complaint herein and in its said answer in this action.” [Tr. fol. 52.]

“Said rancho and patent being the same referred to in the case of Los Angeles Farming and Milling Company v. Thompson *et al.*, reported in 117 Cal. 594, and in Thompson v. Los Angeles Farming and Milling Company, 180 U. S. 72 (45:432). At the time of the commencement of this action, and trial thereof, the defendant, the Los Angeles Farming and Milling company, owned *all of the right, title and interest* that was ever owned by the patentee of said rancho under said United States patent therefor, so far as it relates to the land owned by said defendant and described in the complaint and answer herein.” [Tr. fols. 52-3.]

It is further stipulated as a *fact*,

“That the value of the premises in controversy herein is over \$400,000, and that said defendant and its predecessors in interest have paid all taxes or assessments levied on said lands, and have been in the *actual and exclusive possession* of said lands since the *granting and patenting* thereof, using the same for the ordinary purposes of husbandry, farming and pasturage, claiming to own the same under said grant, decree and patent.” [Tr. fol. 53.]

And the fact is stipulated that:

“Neither the plaintiff (city of Los Angeles) nor any of its predecessors ever contested said grant, surveys thereof or proceedings at any time or in any manner under said act of congress, or any of the acts supplementary thereof.” [Tr. fol. 53.]

And the fact is stipulated that:

“Said rancho is situated some *ten miles above* the city of Los Angeles on said river. And above any of the points of diversion of water by said city.” [Tr. fol. 53, p. 23.]

The foregoing embraces the facts as to the *legal title* of the plaintiff in error in this case.

General Facts.

On behalf of the city some general facts were stipulated as follows:

That the old pueblo continued to use the water of the river as *previously used, it being diverted within the pueblo four square leagues*, until the

incorporation of the city of Los Angeles in 1850.
[Tr. fol. 54.]

And that after the incorporation of the city in 1850, the

“Use of the water of said river was *continued in the same manner as before*, substantially all of said surface water which reached the city limits being diverted within said four square leagues, for the use of the city, and *this has continued ever since*. And that the city has been enlarged from its pueblo and patented area of 17,172 acres to 27,695 acres.” [Tr. fol. 54.]

It is also stipulated that in 1868 certain parties took water from the river at points from *one to three miles below defendants' land*, and that the city has acquired such interests. [Tr. fol. 55.]

And the fact is stipulated that the surface streams of the branches come from the public lands of the United States, on which lands are the sources, and tributaries of said Los Angeles river. [Tr. fol. 57.]

And that all the riparian area of said river is “Embraced within Spanish and Mexican grants confirmed and patented to parties *other than* the city of Los Angeles under said act of congress of March 3, 1851, and from said public lands all of which is shown on Exhibit A, attached to the transcript and within the blue lines marked ‘A-B-C-D.’” [Tr. fol. 57.]

And it is stipulated that the court can take notice of all California statutes relating to the city

of Los Angeles, or to said Los Angeles river, or the waters thereof. [Tr. fol. 57.]

Also that the city has sold all of its original pueblo riparian lands, as patented to it, to private parties in small residence and business lots, but it owns the river bed through the city, some 200 feet wide. [Tr. fol. 58.]

Pursuant to stipulation XXVI [Tr. fol. 59] plaintiff in error as defendant in the trial court filed objections to the relevancy and admissibility of stipulations XVI, XVII, XVIII, XIX. [Tr. fols. 60-6] on the ground that they were not admissible to vary the effect of the United States decrees or patents to either plaintiff or defendant. The objections were overruled by the trial court and proper exceptions taken. These objections and rulings and exceptions appear in Tr. fols. 60-9.

Plaintiff in error does not deem the above objections or rulings to be material except so far as they may preserve the federal questions from dispute in case the objections had not been made.

The same remark applies to the motion and rulings of the court shown in Tr. fols. 80-7.

Statement of Judgment of State Courts.

The case was duly submitted, on the stipulated facts to the trial court, which decided that the *legal title* of all of the Los Angeles river in the public domain and grants was in the defendant in error, plaintiff below, and that said plaintiff below was "*not barred*," or *estopped by reason of any of the facts set forth in the answer herein*."

[Tr. fol. 70.] And that the said plaintiff below "is not estopped by the decree rendered by the board of land commissioners, under the act of congress of March 3, 1851, confirming to the city of Los Angeles the four square leagues of land," or "by any of the proceedings in the matter of the claim of said city for said pueblo lands mentioned in the answer," nor is plaintiff (Los Angeles city) estopped to maintain such ownership by reason of any decree, judgment, patent or proceeding, mentioned in the answer herein." [Tr. fol. 70.]

Judgment was entered that the city of Los Angeles owns the legal title in fee simple to *take and use all* the waters in the Los Angeles river and its branches, including all of the underground waters in said land of the defendant below (plaintiff in error) from the surface of the ground down to bed rock, for municipal purposes within the limits of the city as the limits now are, or *as such limits may exist in the future*, and that the defendant below had no legal title to said waters in

its lands from the surface of the ground down to bed rock, nor to the right to use of the same or of *any part thereof* when the city needed to *take and use* said waters, and that said lands have no riparian right, and that said right of using said waters in said lands are not a part or parcel of said lands. [Tr. fols. 76-8.]

This judgment was affirmed by the Supreme Court of the state of California January 23, 1908 [Tr. fols. 93-104], and rehearing denied February 20, 1908, and thereupon the judgment became final. Chief Justice Beatty filing a partly dissenting opinion February 21, 1908. [Tr. fols. 104-7.]

The federal questions were all distinctly and specially pleaded in defendant's answer; and the facts to support them stipulated, and were positively ruled against by the trial court, as also by the state Supreme Court; and are fully set out in the assignments of error in this court for its decision. [Tr. fols. 121-132.]

The city owns by private purchase a large riparian frontage on the river which is not affected by this case.

ARGUMENT.

The *legal title* alone is the subject of inquiry in this case, and the primary question to be answered is, whether the city of Los Angeles, defendant in error, owned the *legal title* to take and use all the waters of the Los Angeles river from the south boundary of Los Angeles city to and including the main stream, its tributaries and sources from the surface of the ground to bed rock, including the waters on the riparian public domain.

The area embracing the river, its tributaries and sources, includes some 800 square miles, of which some 400 square miles is public domain of the United States, and some 400 square miles is embraced in patented Mexican grants to parties other than the defendant in error, and in all of which area of 800 square miles the city has no title or conveyance of any character from the United States or from any of the patentees of said patented Mexican grants.

Exhibit A, stipulated as a fact [Tr. fol. 57], and which is attached to the transcript herein, at page 38, shows within the blue lines A-B-C-D, the Los Angeles river, its tributaries and sources in the public lands and its course through the various Mexican grants above the city.

The land of plaintiff in error, through which the river runs, is shown in the lines inside of which the word "Kester" appears, the land bound-

ed on the west by the Rancho Encino, south by the Los Angeles and Ventura road, east by Lankershim rancho, and on the north by the heavy line, including some 10,000 acres. The city of Los Angeles lies to the south of this land some ten miles as designated.

Many cities, towns, villages, and settlements are shown on this map located in the various branches of the river and against whom the judgment gives the city of Los Angeles the *legal title* to *take and use* all the waters of the river and sources, from the surface of the ground down to bed rock.

The rights of all of these parties and communities, as well as of the United States, for the waters on said public lands are involved in this case as a precedent, as a judgment of the Supreme Court of the United States affirming the judgment of the lower courts, on the issues in this case would be followed in all future cases.

And as the state courts held that the statute of limitations does not run against cities, it would also follow that all cities in California which were confirmed from pueblo claims would have the same *legal title* to all the waters of the rivers on which they were located, including the tributaries and sources, from the surface of the ground down to bed rock, as against all the upper Mexican grants and public lands of the United States. This would deprive millions of acres of highly culti-

vated land worth hundreds of millions of dollars, with water, and worth nothing without water, of their entire water supply, and reduce the lands to desert aridity and unproductiveness.

It is not an overstatement of this case to say that the productive rural civilization of southern California is largely dependent on the fact whether these cities own the *legal title to take and use* all these waters, or whether the common law doctrine of riparian ownership and use of these waters prevails for the common use of the riparian lands as provided by the laws of the United States and statutes of this state of April 13, 1850, adopting the common law, and which has never been modified by the legislature of this state. And the state courts have no legislative functions or power to change it.

To obtain a proper decision from this court on the above points all of the assignments of error are directed.

First Assignment of Error.

First: The said court erred in its said decision in adjudging, that the Treaty of Guadalupe Hidalgo of February 2, 1848, between the republic of Mexico and the United States did not vest the legal title of the premises in controversy in the United States, subject to the future action of congress thereto. As pleaded in the answer of this defendant (plaintiff in error) as shown by Tr. fols. 13-4. And said judgment is contrary to and in violation to the form, force and effect

of said treaty, and denies the rights and title of this defendant (plaintiff in error) derived and protected thereunder, to the premises in controversy. [Tr. pp. 52-3.]

Neither the state of California nor the city of Los Angeles, defendant in error, was in existence at the date of the treaty, the state being admitted September 9, 1850, and the city being incorporated April 4, 1850, over two years after the date of the treaty. The pueblo took no *legal* title under the treaty, neither did any Mexican grant holder. The legal title necessarily vested by the treaty in the United States.

If the legal title passed to the United States, the judgment must be reversed, for the city, defendant in error, claims no conveyance from the United States or any of its patentees. In fact the contrary is stipulated. [Tr. fol. 51, p. 22.]

Legal Status of Pueblos.

Pueblos were nothing more than political subdivisions of the government of Spain or Mexico. The officers were merely agents of those governments with limited executive powers prescribed by laws. So far as the public domain of those governments were concerned their functions were almost identical with that of registers and receivers of the United States land department in a land district. The pueblo land district was limited under the general laws to four square

leagues, in some instances by special designation it embraced a larger area. These officers could receive applications from citizens for allotments of small subdivisions within the pueblos, for house lots, or small acreages for farming, could designate the subdivisions, consider the proof of occupancy and improvements required by law, receive the fees therefor, approve the applications and forward them to the next higher government officials, and from these they eventually passed to the king or sovereign authority, whose final approval and issuance of title papers passed the legal title as a patent. Until this final act the legal title was in the sovereign government.

Our registers and receivers have the same power to receive from citizens homestead applications and power to approve the locations and evidence of compliance with our laws and forward their action to the commissioner of the land office, and when approved it passes to the sovereign power represented by the president, who approves or disapproves, and signs a patent, which alone passes the legal title. Until the patent issues the legal title is in the government.

The registers and receivers of our land districts do not own the land in their respective land districts and hold no title whatever, and can pass no legal title. The same was true of the pueblos, and of its officers.

By the conquest and treaty the *legal* title of all pueblo land districts passed to the United States, and the land laws of the former government ceased to exist, and were replaced by the land laws of the United States by act of congress of September 29, 1850, entitled "An act to provide for extending the laws and the judicial system of the United States to the state of California," to-wit: "That all the laws of the United States which are not locally inapplicable shall have the same force and effect within the state of California as elsewhere within the United States." (U. S. St. Vol. 9, 521.)

Thereafter no legal title could pass for any part of the public domain in California except, pursuant to the land laws of the United States, then or thereafter enacted, and in force.

The state of California never held title to any land, except by act of congress. The swamp and overflowed lands were granted to all the states by the act of congress of September 28, 1850, U. S. St., Vol. 9, 519, known as the Arkansas act.

The grant of 16th and 36th sections and other lands for school and educational or local improvements to states are all by act of congress.

The state never took any title by reason of its sovereignty, but by reason of its sovereignty congress granted the title to certain lands to all the states.

Private parties and corporations likewise hold under the land laws by United States patent or direct grant by congress.

As in *Leese v. Clark*, 20 Cal. 388, wherein Field, then chief justice of the California Supreme Court, speaking for the court, said, on p. 426:

"The state and individuals hold whatever property they possess, which formerly belonged to the Mexican government, through the United States, and necessarily, therefore, in subordination to any action with respect to such which they covenanted or were bound to take upon its acquisition."

This court held the same in *Knight v. United Land Ass.*, 35 L. Ed. p. 988, and in many other cases.

The legislature of this state on March 20, 1856 (St. 1856, p. 54), enacted as follows:

"Sec. 1. All lands in the state of California shall be deemed and regarded as public lands, until the title is shown to have passed from the government to private parties (excepting tide lands)."

The city of Los Angeles, defendant in error, claims no title whatever from the United States, and no such title is included in the stipulation of facts in this case.

The city therefore has no legal title to quiet as the subject of this action and the judgment should be reversed.

The foregoing points are fully established by the following decisions, state and federal:

Speaking of pueblo titles, this court said in Grisar v. McDowell, 18 L. Ed. p. 866, as to pueblos:

"The purposes to be accomplished by the creation of *pueblos* did not require their possession of the fee. The interest, as we had occasion to observe in the case already cited (*Townsend v. Greely*) amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. *And this limited right of disposition and use was, in all particulars, subject to the government of the country.*"

And on page 868, the court says:

"It is enough that the *title* had not passed to the plaintiff, but *remains in the United States.*"

On the same page the decision closes with the words:

"But it is sufficient, as we have already said, that the lands remained the *property of the United States.*"

The above was quoted and affirmed by this court in case of U. S. v. Santa Fe, 41 L. Ed. p. 888, wherein on page 884 the court speaking of San Francisco pueblo says:

"It is shown by the finding of the court that whatever was the right of the city it was so inchoate that up to the time of confirmation by the

United States all the ungranted land within the area claimed was subject to such dedication for public purposes as the United States saw fit to make. That is, *that the whole ungranted land covered by the claim was substantially public domain at the entire disposition of the United States.*"

And on page 887, speaking of pueblo rights, says:

"To all of which rights the United States succeeded as successor of the king of Spain and the government of Mexico."

These decisions were again quoted and affirmed by this court in U. S. v. Sandoval, 42 L. Ed. on page 174, and adds on p. 174:

"The *fee* of the lands embraced within the limits of pueblos continued to remain in the sovereign, and *never in the pueblo* as a corporate body. Subsequent decrees, orders and laws did not change the principle."

In U. S. v. Santa Fe, *supra*, p. 889, the court specially explains that the title and confirmation of all California pueblo claims rests upon a grant presumed by the 14th section of the act of congress of March 3, 1851, and not upon Mexican laws, and was a mere act of grace, a donation from this government, and that pueblos had no title except such as that act conveyed or authorized.

The act of congress creating the court of private land claims for New Mexico, of March 3,

1891, 26 Stat. at L. Chap. 539, omits the *presumption* of a grant to the pueblo as was provided in the California act of 1851, section 14. Speaking on this difference, this court in the U. S. v. Santa Fe case on p. 889 L. Ed. says:

"The difference between the act of 1891 and the California act of 1851, hitherto referred to, accentuates the intention of congress to confine the authority conferred by the later act to narrower limits than those fixed by the act of 1851. The act of 1851 authorized the adjudication of claims to land by virtue of any 'right' or 'title' derived from the Spanish government, and conferred the power in express language on the board and court to *presume and grant in favor of a town*. The act of 1891 not only entirely omits authority to invoke this presumption, but as we have seen, excludes by express terms any claim, the completion of which depended upon the mere grace or favor of the government of Spain or Mexico, and of the United States as the successor to the rights of those governments.

Nor do certain expressions contained in the opinion in *San Francisco v. Le Roy*, 138 U. S. 656 [34:1096], and *Knight v. United Land Asso.*, 142 U. S. 161 [35:974], when properly understood, conflict with the foregoing conclusions. Those cases dealt with the rights of San Francisco after they were recognized by congress, and to the extent only of that recognition. The language referred to, therefore, simply amounted to saying that as congress had to a certain extent recognized the claim of San Francisco, to the limit of this recognition and no further the rights of that city would be treated as relating back and originating from the nature of the claim presented, and which in part through the grace of congress had been allowed."

All the decisions of the Federal Supreme Court are to the same effect. As this court clearly said in *Trenouth v. San Francisco*, 25 L. Ed., p. 627:

“The title of the city to the land within the four square leagues rests, therefore, *upon the decree of the Circuit Court* as entered on the 18th day of May, 1865, and the confirmatory act of congress.” (Affirmed in *San Francisco v. Le Roy*, 34 L. Ed. p. 1100, and in *Knight v. United Land Asso.*, 35 L. Ed. p. 982.)

That the *legal* title was by the treaty vested in the United States and not in the pueblos, is the decision of the California Supreme Court from first to last of its decisions.

In *Woodworth v. Fulton*, 1 Cal. p. 307-8, the court said:

“I am, however, of the opinion that, even though San Francisco had become a pueblo previous to the conquest, and had been invested with all the rights incident to such character the lands within its limits still continued a portion of the *public domain*. The full and absolute title of the nation to lands within the limits of pueblos, other than such as were, in limited quantities, expressly granted to the pueblo, for the purpose of defraying certain expenses incidental to the administration of the local government, *does not seem, in any case, so far as I have been able to ascertain, to have been divested or in the least impaired.** * * The United States, by the conquest of California, acquired an inchoate and imperfect title to all of the national domain of Mexico situated in that territory, *which title was perfected by the treaty of peace.** * * All laws of Mex-

ico concerning the disposition of public lands must have ceased the moment California was effectually subdued and occupied by the American forces."

In *Ward v. Mulford*, 32 Cal. 372, the court said:

"In private proprietorship and in sovereign right, the United States succeeded the Mexican government. And in both these respects California, *so far as she acquired any right in either*, succeeded the United States, and became privy to the latter in estate in all respects, to all lands within her borders, whether such as may be held in private or sovereign right."

The last decision by the California Supreme Court on this subject was made January 24, 1908 (one day after its decision in the case at bar), in Case I. A. No. 1908. The People of the State of California, etc., v. H. Kerber *et al.*, reported in Pacific Reporter, Vol. 93, on p. 881, and will probably appear in 152 Cal.

The alcalde of San Diego pueblo on March 18, 1850, executed a deed for certain premises; nine days later the city was incorporated. Speaking of this deed the court says:

"San Diego was incorporated March 27, 1850, nine days later (Stats. 1850, p. 121). This conveyance could not have any force or effect to pass the title. *At that time the title had accrued to the United States as sovereign.* The community which afterwards became the city of San Diego was then a mere unincorporated village, or at most a Mexican pueblo,

exercising some powers in that capacity. Whatever powers it may have possessed over this land as a Mexican pueblo before the cession of the territory to the United States, *those powers ceased when the cession took place, and the sole power and authority to dispose of such lands was thereupon transferred to the United States, and was by it transferred to the state of California at the time of its admission as a state September 9, 1850.*" (These were tide lands in San Diego bay that passed to the state on its admission).

It being established, therefore, that the *legal title* of the premises in controversy, passed by the treaty to the United States, and never passed to the defendant in error, the judgment should be reversed for want of *legal title* in the city to quiet.

Counsel for the city in its brief before the state Supreme Court disclaims any title from or through the United States, and on page 70, said: "It thus appears that the title of the city to the *pueblo lands and the waters of the river was derived from Spain and Mexico and not from the United States.*"

Just how the city, created under the sovereignty of the United States, could acquire the *legal title* to real property within the United States from a foreign sovereign, is not apparent.

The *legal title* to the pueblo lands passed by United States patent to the city. There is not a stipulation of fact in the case showing any conveyance from the United States to the city, de-

fendant in error, for the *waters of the river*, the subject of this action.

In fact it is stipulated [Tr. fol. 51, p. 22] that neither of the city patents from the United States embraces any of the lands of the defendant, described in the complaint or answer herein, nor does it even refer to the waters of the river, but recites a rejection of all claims or rights outside of the four square leagues of land.

The decisions cited above show that neither the defendant in error nor the pueblo ever held the legal title prior to the treaty, and that it passed by the treaty to the United States.

The state courts decided against the validity, force and effect of the treaty in so passing the legal title to the United States as pleaded in the answer in the trial court by this plaintiff in error [Tr. fols. 13-4], the protection of which treaty this plaintiff in error specially pleaded and claimed for its title subsequently conveyed by the United States patent as shown by Tr. fols. 52-3, stipulation of facts, and as covered by the first assignment of error.

Second Assignment of Error.

Second: That said court erred in its said judgment in adjudging that the act of congress entitled An Act to Ascertain and Settle the Private Land Claims in the State of California, approved March 3, 1851, did not include, but excluded, the jurisdiction of the real property rights of the parties to this action, for the premises in controversy herein, as pleaded in the answer of this defendant (plaintiff in error) [Tr. fols. 15-21], and as shown in the stipulation of facts on which this case was submitted in Tr. fols. 25-53. And that judgment is against the validity, force and effect of said act. [Tr. fol. 122, p. 53.]

The California Supreme Court held that this act did not have jurisdiction of the waters in, on and riparian to the lands in California that "no other word designating *property* is used in it other than *land*." [Tr. fol. 97.] That is the state court held that the waters in, on and riparian to the land from the surface of the ground down to bed rock, in California, were not a part and parcel of the land, and were excluded from the jurisdiction of the act because a more general "property" word was not used than the word "land."

This court has fully decided to the contrary.

In case of U. S. v. Judges of Circuit Court, 18 I. Ed. on p. 113, this court said:

"It is urged that the proceedings under the act of 1851 concerning California land titles are special, and are not to be regarded as cases either in

law or equity. *The law is general and concerns the title to the whole of the real property of the state.*"

The city of Los Angeles in its complaint alleges the subject matter of this action to be "*real property*" [Tr. fol. 9], thus bringing it directly, within the jurisdiction of this act of 1851, as above defined by this court as well as in the following decision:

In U. S. v. Fossett, 16 L. Ed. on p. 186, this court, speaking of this act, said:

"This jurisdiction comprehends *every species of title or right*, whether inchoate or complete, whether resting in contract or evidenced by authentic act and jurisdictional possession."

The same is held in:

Fremont v. U. S., 15 L. Ed. on p. 244;

Castro v. Hendricks, 16 L. Ed. on p. 376;

Beard v. Fredery, 18 L. Ed. on p. 92;

Knight v. United Land Assoc., 35 L. Ed. 989;

Thompson v. Los Angeles Farming & Milling Co., 45 L. Ed. on p. 434;

Mitchell v. Frermin, 45 L. Ed. on pp. 611-612;

Barker v. Harvey, 45 L. Ed. on p. 968.

The California Supreme Court in case of McGarrahan v. Maxwell, 28 Cal. on pp. 96-7, specially defined the jurisdiction and said:

"In the act of congress of 1851, to ascertain

and settle the private land claims in the state of California, the word *claim* is used as *comprehending every species of right, title or interest, legal or equitable, in or to lands derived from the Spanish or Mexican government.* The words claim and grant are not synonymous, but a claim will include a grant, and also a *right or interest that did not pass by grant*, but is based upon some *equity possessed by claimant*, entitling him to have his right perfected by the government, by a *conveyance of the legal title.*"

These decisions establish the complete and general jurisdiction of the act of 1851, over the entire claim in controversy herein.

Under the language used in the act no other construction is possible.

The first section of the act states its object, "That for the purpose of *ascertaining and settling private land claims.*" The word *claim* as well as the word *land* are used without any limitation, restriction or reservation, and are general as to everything that is a *claim* of any character to land or any part or parcel thereof.

The 8th section is also general, both as to persons and property:

"That *each and every person, claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners, etc.*"

No limitation, reservation, or exception is made in any of the foregoing words. They are all general as to every claim of every person based

on either a *right*, or a *title* derived from the Spanish or Mexican government.

Sec. 11 also further specifies the general character of the jurisdiction:

"That the commissioners herein provided for, and the district and supreme courts, in deciding on the validity of any *claim* brought before them under the provisions of this act, shall be governed by the Treaty of Guadalupe Hidalgo, the law of nations, the *laws, usages and customs* of the government from which the *claim* is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

Every property right, title or claim of the city, whether under the treaty, law of nations, or *laws, usages or customs* of Spain or Mexico, or under the principles of equity, or decisions of the Federal Supreme Court, were included in this general wording of the act. The 13th section is also general as to the effect of the act.

This court in *Knight v. United Land Association*, 35 L. Ed., p. 989, fully declared the law as above, saying:

"The act of 1851 also made provisions for the investigation and *determination of the property rights of pueblos*."

The state courts therefore were in error in holding that the real property claim, asserted in the case at bar was not subject to the jurisdiction

of said act of congress of March 3, 1851, as fully set out in the said second assignment of error, and the judgment should be reversed, for the claim of the city was terminated and rejected by virtue of the proceedings under that act as set out in the stipulations of fact. [Tr. fols. 28-50.]

Third Assignment of Error.

Third: Said court erred in its said decision in adjudging and construing said act of March 3, 1851, to the effect that the word "land" used therein, and in the proceedings, decrees and patents thereunder, did not include, but excluded, all the waters in, on or riparian to the land from the surface of the ground down to bed rock, and that such waters constituted no part or parcel of the lands in California, or of the land in controversy owned by said defendant (plaintiff in error), and that said act, and the decrees, and patents thereunder in the said cause of the city of Los Angeles v. the United States, in using the word "land" therein, did not include, but excluded that part, and parcel of this defendant's land in controversy herein known and designated as the waters, in on, and riparian to the land from the surface of the ground down to bed rock and every part thereof. And that said act, proceedings, decrees, and patent of the tribunals thereunder did not adjudicate and terminate the said claim of the city of Los Angeles to the premises in controversy therein, and herein, and were not *res adjudicata*, nor a bar, nor an estoppel herein, as pleaded in this defendant's (plaintiff in error) answer. [Tr. fols. 17-21.] In all of which said judgment is against the validity, form, force and effect of said act. [Tr. fol. 122, p. 53.]

The third assignment of error is that the state court erred in holding that the word *land* in said act of Congress of 1851, did not include but excluded from the jurisdiction of said act the waters that are in, on and riparian to the lands from surface to bed rock, in California, and that such waters are not a part and parcel of the riparian lands within the meaning of that act. The general land laws were extended over California by act of congress September 29, 1850.

In the entire system of land laws of the United States, no such limitation of the word *land* exists. Such a limitation of the meaning of the word *land* is unknown to the laws of the state of California, or of any other state or at common law.

This court in Illinois C. Ry. Co. v. City of Chicago, 44 L. Ed., p. 627, said:

"We do not question the general principle that the word *lands* includes *everything* which the land carries, or which stands upon it, whether it be natural timber, artificial structures, or *water*, and that an ordinary grant of *land* by metes and bounds carries all *pools and ponds, non-navigable rivers, and waters of every description* by which said *lands or any portion of them may be submerged.*"

Stur v. Beck, 33 L. Ed. 791, is also to the same effect.

The California cases give the word *land* the same meaning, in patented Mexican grants.

In Gould v. Stafford, 91 Cal., on p. 155, the court said:

"The right of a riparian proprietor to the flow of a stream of water over his land is an incident of his *property in the lands*, is annexed to the *land*, and considered a *part and parcel* of it."

And in Hargrave v. Cook, 108 Cal., on p. 77, says:

"His rights are *not easements* nor appurte-
nances to his holding. They are not the rights
acquired by appropriation, or by prescriptive use.
They are attached to the soil, and pass with it."

In Rose v. Messmer, 142 Cal., on p. 329:

"It was not necessary to mention or describe
in the complaint in the partition suit the water
rights in the creek. *Being a parcel of the land*
itself, the description of the land included the
water."

And in Cal. Irr. Co. v. Wilshire, 145 Cal., on p. 73, says of such waters:

"This right is part of the estate of the plaintiff,
a parcel of its land."

On the same day, January 23, 1908, on which the state Supreme Court filed its decision in the case at bar, it also filed a decision in L. A. No. 1797, The Verdugo Canon Water Co. v. Verdugo *et al.*, reported in Pacific Reporter, Vol. 93, on P. 1025 (1) (and will probably appear in 152 Cal.), relating to surface and underground wa-
ters within about five miles of the lands in contro-
versy, in which the court said of the *land*:

"Its waters were therefore not merely appurtenant thereto, as a right acquired by prescription, or appropriation would be, but *were a part of the land itself, as parcel thereof.* This was the case with respect to each of the three surface streams then flowing, and also with respect to *all the underground flow.*"

The California courts have never deviated from the foregoing meaning of the word *land*, except in the case at bar.

In fact, in the case at bar the court seemed to be unconsciously impressed with this uniform line of legal decisions when it said:

"Of course the word *land* as a conveyance carried *every kind of property right and appurtenances, which is legally embraced in that word.*" [Tr. fol. 98, p. 42.]

The act of congress in question, of March 3, 1851, therefore had complete jurisdiction of all the waters of the Los Angeles river as part and parcel of the lands derived from Mexico, as well as of all the lands and waters therein, within the state of California.

Having this jurisdiction the proceedings, decrees and patent, to the city, excluding all the premises in controversy, from the city, were necessarily *res adjudicata*, and a bar, and an estoppel to the present claim of defendant in error that at the time of its organization in 1850 and now that it owns in fee simple the legal title as claimed by it the premises in controversy. And

the state courts were in error in holding and deciding to the contrary, as fully set out in the said third assignment of error. [Tr. fol. 122.]

The state courts had no power to make an exception in the law. As said by this court in French v. Spencer, 16 L. Ed. 97:

"And then what is the rule? One that can not be departed from without assuming on the part of the judicial tribunals legislative power.

"It is that where the legislative power makes a plain provision without making any exception, *the courts can make none.*"

Fourth Assignment of Error.

Fourth: The court erred in its decision and judgment, in that (after holding and adjudging that the real property claimed by the city of Los Angeles in this suit was not submitted by congress by said act of March 3, 1851, to the tribunals therein provided, but was excluded from the jurisdiction thereunder) it should have decreed and adjudged that the state courts had no jurisdiction over said claim. And that no action could be maintained in said courts of justice on any title derived from the Spanish or Mexican authorities, unless jurisdiction to try and decide it has first been conferred by act of congress; and that the legal title was in the United States, so far as any such claim was concerned, and that the judgment of the lower court must be reversed on the ground that the city of Los Angeles had failed to show the legal title in itself, and judgment should have been ordered for the said defendant (plaintiff in error) as prayed for. [Tr. fol. 123, p. 53.]

The fourth assignment of error is to the effect that when the California court held that the said act of congress of March 3, 1851, did not include (but excluded) the jurisdiction of this claim of the city, stipulated to be derived under a grant from the laws of the Spanish and Mexican government, it thereby established that it had no jurisdiction of this case, and should have reversed the trial court in its decision and dismissed the case.

This court in Chouteau v. Eckhart, 11 L. Ed., on p. 845, said on this subject:

*"For it has been repeatedly held by this court, that under that treaty, no inchoate and imperfect title derived from the French or Spanish authorities can be maintained in a court of justice, unless jurisdiction to try and decide it has first been conferred by act of congress. Certainly no such jurisdiction has been given to any state court. And the Supreme Court of Missouri were right in sustaining the demurrers. * * * The court had no jurisdiction upon the question."*

In U. S. v. Santa Fe, 41 L. Ed., on p. 888, this court said:

"To the extent only that congress has vested them with authority to determine and protect such rights can courts exercise jurisdiction."

The above is quoted and affirmed in U. S. v. Sandoval, 42 L. Ed., on p. 173.

The act of congress of September 9, 1850, admitting California, Sec. 3, also prohibits the state in every department from interfering with the primary disposal of all of the public or national

domain and from interfering with or questioning the right of the government to dispose of the same, thereby divesting and prohibiting state jurisdiction of such cases.

Therefore the fourth assignment of error is fully sustained by the law of the case, and the decision of the state court should be reversed.

Fifth Assignment of Error.

Fifth: The said court erred in its said judgment, in adjudging and denying to the United States patent, under which this defendant (plaintiff in error) holds, the general common law riparian rights of the state of California, and of the United States, to wit: That the waters in, on and riparian to the land conveyed by said patent, are a part and parcel of the land, and pass with and are conveyed by the patent from the United States to the patentee, with the general common law riparian rights to the use of the same. And the court likewise erred in construing and adjudging in said judgment, that the said patent from the United States to the city of Los Angeles, conveyed any other or greater right or title to said waters than the said general common law riparian rights, of the state of California, and of the United States gives to the said patent of this defendant (plaintiff in error), or that it in any manner, subordinates, or transfers the riparian rights, or any part or parcel thereof, or any interest, right or title thereto, of the land of this defendant (plaintiff in error) to the city of Los Angeles.

And also by said construction and said judgment, said court erred in that; it thereby denied to this defendant (plaintiff in error) the equal

protection of the said general common law of riparian rights, of the state of California and of the United States, as provided in Sec. 1, Art. XIV, of the constitution of the United States. [Tr. fol. 124, p. 54.]

The general law of the state of California gives equal riparian rights under the U. S. patents to the parties hereto, and does not take the right of one and give it to the other.

This assignment of error is directed to that part of the state court's decision shown in Tr. fol. 98, p. 42, beginning with the sentence:

"Of course the word 'land,' as a conveyance, carried *every kind of property, right* and appurtenance, which is legally embraced in that word; but what rights go to a patentee of land depend, not upon any supposed adjudication contained in the patent, but upon the *general law of the state where the land is situated.*"

The court then, on Tr. fol. 99, quotes from Hardin v. Jordan, 140 U. S. 371, to wit:

"In our judgment the grants of the government of land bounded on streams and other waters without any reservation or restriction of terms are to be construed as to their effect according to the law of the state in which the lands lie."

The court then proceeds to take the riparian water in the land of one patent and transfer it to the city land, ten miles below, in addition to the city's other riparian rights.

Both parties herein hold under separate patents that do not overlap, issued on their separate Span-

ish and Mexican claims, under the act of congress of March 3, 1851, the land of each being riparian lands of the Los Angeles river ten miles apart.

It is stipulated [Tr. fol. 51, p. 22] that "neither of the patents to the city under that act embraces any of the lands of the defendant described in the complaint or answer herein," and that the city's claim under the laws of Spain and Mexico was limited to four square leagues, and that all other premises claimed by it were rejected as invalid. [Tr. fol. 43.]

It is also stipulated that the claim of the plaintiff in error (defendant below) under the Spanish and Mexican laws was duly patented under said act and that the

"United States grants the land therein embraced with the appurtenances and without making any reservation or exception of any rights to said river or its sources or tributaries, or of the waters thereof." [Tr. fol. 52.]

And that

"Said rancho is situated some ten miles above the city of Los Angeles on said river, and above any of the points of diversion of water by said city." [Tr. fol. 53, p. 23.]

No question of overlapping patents is involved in this case.

Whatever then is the general law of the state of California as to riparian rights, it is equally applicable to plaintiff and defendant. Whatever the rights of one under the general law of the

state, the other has the same, and the state court erred in not so adjudicating.

What is the general law of California as to riparian rights of riparian owners? The law is made by the legislature, and what law has it enacted on this subject?

The common law was adopted by this state on April 13, 1850 (Stats., p. 219), as follows:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state."

This law has never been changed or modified by the legislature of this state, and the courts have no legislative power to change it.

The state Supreme Court in Lux v. Haggin, 69 Cal., on p. 384, says:

"The act of 1850 adopts the common law of England; not the civil law; nor the *jus commune antiquum*, or the Roman law of nature of some of the civil law commentators (Braley v. Reese, 51 Cal. 564), nor the Mexican law; nor any hybrid system. * * *

"Whatever the law pre-existing the statute of 1850, it was *then and there done away with, except as it agreed with the common law*. The matter was settled, if the lawmakers had power to settle it."

And on p. 385 the court further says:

"If anything has been said in earlier decisions —which cannot be resolved into mere *dictum*, or

as applicable to the peculiar facts—that apparently conflicts with the settled rule, it *is considered to be an erroneous exposition of the law.*"

And on p. 392 says:

"By settled principles of *both* the *civil and common* law, the riparian owner has a usufruct in the stream as it passes over his lands, of which he *can not be deprived by mere diversion.*"

And on page 394, says:

"XV. *By our law*, the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation."

And on pp. 312-313, the court further says:

"Whatever is the general law bearing on this subject, it *is the same everywhere within the limits of the state.*" * * * "Neither court nor jury can say that it is expedient to declare that a law shall be operative in one part of the state which differs from the law in other portions, or to decide that there is no general law bearing on the subject."

On p. 382, the court says:

"In adopting the common law, the legislature adopted the common law, and not some other law."

On p. 390 the court says:

"XIV. Riparian Rights. By the common law the right of the riparian proprietor to the flow of the stream is *inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it.*"

On p. 391:

"The right to the flow of the water is inseparably annexed to the soil, and passes with it.
* * *"

And:

"The right to the use of waters flowing over land is undoubtedly identified with the *realty*."

On p. 392:

"It has *always been held* that a grant of *land* carries with it the water flowing over the soil."

On p. 392:

"It is unnecessary to pursue the subject further, or to refer to the many text books and decisions of the courts, in England, and in other states, which fully support the proposition laid down in the foregoing title. (No. XIV.)"

The court then cites the California decisions all to the same effect.

There are no California decisions to the contrary.

The general law of the state as to all cases such as the one at bar, as to the right of each party under its patent, was also declared by the state Supreme Court in Lux v. Haggin (*supra*), 69 Cal., on p. 340.

"Unless, therefore, running waters are reserved they pass by grant or *patent of the United States*.
* * *

"The only mode by which a right of property in a water course, above tide water, can be withheld from a person who receives a grant of *the land* is by a reservation directly or implied to such

effect. If the intention of the grantor is not to convey any interest in the water, he can exclude it by the insertion in the instrument of conveyance of proper words for the purpose of doing so; but *in the absence of such words* the bed, and consequently the stream itself passes by the conveyance." * * * "The statement that the grantee or *patentee acquires from the United States*—the absolute and unqualified owner of the public lands—common-law rights in the *waters* flowing through the *land granted* (except where the waters or a portion of them are reserved) *has never been disputed.*"

And on p. 350 (*Id.*) the court says:

"But where one or both parties claim under a grant from the United States (the absolute owner, whose grant includes all the incidents of the *land and every part of it*), it is difficult to see how a *policy of the state*—or a general practice, or *rulings of the state courts* with reference to adverse occupants on public lands—can be relied on, as limiting the effect of the grants of the United States, *without asserting that the state, or the people of the state, may interfere with 'the primary disposal of the public lands.'*"

And on page 377 (*Id.*) the court says:

"Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, *nor to detract from the estates in such lands granted under the laws of the United States.*"

And on page 385 (*Id.*) the court says:

"The rule of the common law involved or presented in the question ought to be considered as settled."

And on page 386 says:

"Nor do we know of cases where the courts in the United States have undertaken to change the common law."

This court in *Hardin v. Jordan*, 140 U. S., p. 371, considers the common law rights of owners under United States patents, in the states, and will determine for itself as a federal question such rights under the general state law. In that case on p. 384 the court says:

"The United States have not repealed the common law as to the interpretation of its grants.
* * * We have adopted the common law, and therefore must apply its principles to the interpretation of its grants. * * *

"The next question for consideration, therefore is, what is the common law of Illinois with regard to such grants."

And says:

"It is our judgment that the law of Illinois, in this regard is the common law *and nothing else*, and that the opinion of the court in *Trustees of Schools v. Schroll*, is not in accordance with the common law."

In the case at bar the decision of the state court is not in accord with the common law of the state of California, or of the United States, and is error.

On p. 385-6 (*Id.*) the court says:

"That the common law is the *true and only law of Illinois on the subject of land titles, and espe-*

cially as to the rights of riparian owners." (The same is true in California.)

And on p. 386, the court refers to the statute of Illinois adopting the common law, the same as California adopted it in 1850, and says on p. 388:

"The disposal of the present case, therefore, seems to us to require, further, only an answer to the single question, 'What is the common law in regard to the title of fresh water lakes and ponds.' "

The same doctrine is held in U. S. v. Chandler-Dunbar Water Power Co., No. 599, decided April 20, 1908.

And in this assignment of error the single question is, What is the common law in California in regard to the fresh water stream in, on and riparian to the land of plaintiff in error?

On this there is no uncertainty; it is *settled* by the legislative adoption of the common law in 1850.

The common law was adopted by the legislature of this state, April 13, 1850 (Stats. 1850, p. 219) prior to the act of congress of March 3, 1851, to ascertain and settle private land claims in California, and prior to all adjudications and patents thereunder.

This act in itself was a conveyance to all land owners, including the United States, of the common law riparian rights, and it also adopted the common law definition of "land" as including all

the waters in, on and riparian to "land" as a *part and parcel of the "land" itself.*

"The act of April 13, 1850, should now be held to have operated (at least from the admission into the union) a transfer or surrender to *all riparian proprietors*, of the property of the state—if she had any—in unnavigable streams and the soils below them."

Lux v. Haggin, *supra*, p. 338.

On September 28, 1850 (U. S. St. at L., Vol. 9, p. 521) congress extended all the laws of the United States, not locally inapplicable to the state of California and thereby the common law of riparian rights of the United States, as administered in its land laws, was extended to all lands in California, with its definition of "land" as including riparian waters as a *part and parcel of the "land" itself.*

The proceedings, decrees, and patents under the act of congress of March 3, 1851, to settle the private land claims in California, also and necessarily included, all that the common law of the state and of the United States included, in the adjudication under that act.

And therefore when a person presented his petition for confirmation of "land" there was included thereby a presentation of all of his common law riparian rights, as *part and parcel of his "land" itself*, and the decrees and patents thereunder were coextensive with the common law rights, and carried them to the patentee—to all

pattees equally—with priority to none. (Just the same as section 7 of the plan of Pitic did under the Spanish laws, as correctly translated.) [Tr. fol. 36, p. 15.]

The California Supreme Court was in error when in this case it said [Tr. fol. 97]:

"The city was no more called upon to set up its water rights as successor to the pueblo than were appellant's predecessors called upon to set up the riparian rights of the land claimed by them."

Appellant's predecessors *did* present their common law riparian rights in their petition when they used the common law word "land." Likewise did the city when it presented its petition for "land" present its common law riparian rights for the same "land."

But if the city claimed the waters that were not a common law part of its lands, but which were a part and parcel of defendant's land and of the land of the United States, it would have to so claim in its petition, which it did in the case before the United States land commissioners as shown by stipulation of facts [Tr. fols. 29-39], and which was rejected by the decree of the commissioners [Tr. fol. 43] and by the city's U. S. patent [Tr. fol. 45.]

Land cannot pass as appurtenant to land. As this court said in *Jones v. Johnston*, 15 L. Ed. 320:

"Land cannot be appurtenant to land. * * * It would be absurd to allow the *fee of one piece of land not mentioned in the deed to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries.*"

Notwithstanding the above declared absurdity by the highest court in the United States, the California court holds that the city was not obligated to present to the land commissioners its claim, or any claim for the water part and parcel of all the lands of the water shed of the Los Angeles river, but that in some way this most valuable and momentous land interest, a part and parcel of all those riparian lands, some 800 square miles, *passed* in some way as appurtenant to the four square leagues of land described in the city patent, which patent it is stipulated does not include the premises in controversy. [Tr. fol. 51, p. 22.] And it is stipulated that the patent to this plaintiff in error [Tr. fol. 52] and the patents to other Mexican grantees, and the public lands [Tr. fol. 57] do embrace all of said riparian lands, and there is no stipulation of fact of any conveyance to the city of Los Angeles, whatever for said premises. Neither did it pass under the common law, nor under any law of congress. And all other laws, of the former governments ceased with the treaty.

However the common law of riparian rights being the only law in existence, both in the state

of California and in the United States, during the entire period of the proceedings, decrees and patents, involving the entire subject matter of the present action, it can only be held that this common law, and it alone, entered into and determined the respective riparian rights and uses of both plaintiff in error and defendant in error, and that no legislative power exists in the California courts to change this law or the legal rights thereunder of the parties hereto. This is fully declared to be the law by this court in:

Hardin v. Jordan, 35 L. Ed. 428;
Grand Rapids & Ind. R. Co. v. Butler, 40
L. Ed. 85;
U. S. v. Chandler-Dunbar W. P. Co., de-
cided April 20, 1908, reported in U. S.
court advance sheets of May 12, 1908,
p. 579.

The state may regulate the method of use of riparian waters by the owners among themselves, as to whether each one shall use so many inches all the time, or all its flow so many hours per month for necessary uses.

But when, as in this case, the state court undertakes to adjudicate that one riparian owner under its patent from the federal government can "*take and use*" all the waters of a stream, in the land from the surface of the ground down to bed rock, from all other, or any other, riparian

owner holding a similar federal patent as well as from the riparian public lands of the government, it is not regulating the use of the water among the owners, but is depriving such owners of their property without due process of law and without just compensation therefor, and without due process of law, and is violative of Sec. 1, Art. XIV. of the federal constitution and of the various acts of Congress as pleaded in the answer in the trial court by this plaintiff in error as defendant therein, and as fully set out in the said fifth assignment of error.

Note: The state Supreme Court bases its decision in the case at bar, not on the riparian laws of the state of California, nor on the riparian laws of the United States, but on certain of its own decisions as being the riparian law of this state. They are made the special subject of the eleventh assignment of error, post, p. 89.

Sixth Assignment of Error.

Sixth: The said court erred in its said judgment adjudging that the said United States patent to the predecessors in title, of this defendant (plaintiff in error) as stipulated in Tr. fols. 52-3, did not convey the legal title to the premises in controversy as part and parcel of the land therein conveyed; and that said patent was not conclusive, of the legal title of the patentee, to every part and parcel of the land therein described, in-

cluding the waters, in, on and riparian to said land as a part and parcel of the land itself.

And said court erred in its said judgment in that when said patent was introduced in evidence, and it was stipulated [Tr. fols. 52-3] that the land in controversy was included within the boundaries of the patent, and that the patent to the city of Los Angeles did not embrace any of the lands of this defendant (plaintiff in error) described in its said patent, and described in the complaint and answer in this action [Tr. fol. 51], and that said lands of this defendant (plaintiff in error) were situated some ten miles distant from the said city of Los Angeles on said river, and above any of the points of diversion of water by said city of Los Angeles [Tr. fol. 53], judgment should have been rendered for this defendant (plaintiff in error). [Tr. fol. 125.]

The United States patent is the only document that passes the legal title to any Mexican grant claims. Until its issuance the legal title remains in the United States. On its issuance the legal title vests in the patentee and his successors in title, and can only be attacked by a party having an adverse claim first confirmed and patented by the United States.

The patents issued under the act of congress of 1851 are by section 15 made conclusive between the United States and the claimant.

In *Meader v. Norton*, 20 L. Ed., on p. 187, this court said:

“Argument is not necessary to show that a patent in a suit at law is conclusive evidence of title

against the United States and all others claiming under the United States by a junior title. *Until the patent issues the fee is in the government, but when it issues the legal title passes to the patentee.* Persons claiming to hold the land against the patent, *cannot have relief in a suit at law.*"

To the same effect are:

Wilcox v. Jackson, 10 L. Ed., p. 273;
Bagnell v. Broderick (*Id.*), p. 242;
Gazzam v. Lessee of Phillips, 15 L. Ed.,
on p. 960;
U. S. v. Pacheco, 16 L. Ed., on p. 337;
U. S. v. Halleck, 17 L. Ed., on p. 668;
U. S. v. Billings, 17 L. Ed. 848;
Beard v. Fredery, 18 L. Ed. 89.
Gibson v. Chouteau, 20 L. Ed., p. 537;
Carpenter v. Montgomery, 20 L. Ed., p.
701;
Moore v. Stembach, 32 L. Ed. 51;
Thompson v. Los Angeles Farming and
Milling Co., 45 L. Ed. 432.

"When the patent * * * was brought before the referee, and it was conceded that the land in controversy was included within the boundaries embraced by the survey embodied in it. *Judgment should have been rendered for the defendant.*"

Knight v. United Land Association, 35 L.
Ed., p. 988.

The defendant in error holds no conveyance or patent from the United States, of any character, for the premises in controversy none is stipulated in the facts of this case. The patent to the city for its claims under the laws of Spain and Mexico by stipulation [Tr. fol. 51, p. 22] excludes it. And by stipulation of fact [Tr. fols. 52-3] the United States patent under which plaintiff in error claims includes the land in controversy and the waters thereon as part and parcel of the land itself.

The lower courts therefore were in error, as fully set out in said sixth assignment of error, and their judgment should be reversed.

Seventh Assignment of Error.

Seventh: The said court erred in its said decree and judgment, in that said judgment interferes with the primary disposal of the public lands within this state, and said judgment is an act whereby "the title of the United States to, and right to dispose of the same is impaired and questioned," as prohibited in Sec. 3, in the act of congress admitting the state of California into the Union, approved Sept. 9, 1850, in that it decrees that the word "land" in said patent and said act of congress to ascertain and settle the private land claims in the state of California approved March 3, 1851, does not include, but excludes, that part and parcel of this defendant's land, known and described under the laws of the United States and the state of California as a part and parcel of the land itself, to-wit: The waters in, on

and riparian to said land, in controversy herein.
[Tr. fol. 126.]

This assignment of error is to the effect that the judgment of the state court construing the word "land" in said act of congress of 1851, and as used in the patents and decrees thereunder, as excluding and not including that part and parcel of the land of plaintiff in error, known and described under the laws of the United States and of the state of California as part and parcel of the land itself, to-wit: the waters, on, in or riparian to the land, from surface to bed rock, of plaintiff in error, is violative of section 3 of the act admitting the state of California of September 9, 1850, which prohibits any act by the people of the state by its legislature or otherwise from *in any manner interfering with, or calling in question the title issued by the United States in this case.*

The state courts have no jurisdiction to reverse, revise or modify titles issued by the United States. Their sole jurisdiction in such cases is limited to declaring what title the United States has passed and to whom, as *described and declared in the obvious words of the patent.* That is, the state courts have no power to detract from the estate patented to one, and convey or transfer it to some other party, as was done in this case.

In the case at bar under color of construing

the act of congress and patents issued thereunder the state court has detracted that part and parcel of the land itself known as the waters in the land from the surface of the ground down to bed rock, and transferred and conveyed it to the city of Los Angeles. It thus interfered with and called in question the original primary disposal of lands of which the United States held the legal title under the treaty, in violation of section 3 of the act of congress admitting California as a state.

The patent to the city positively excludes this land, for the decree of confirmation excluding everything but four square leagues of land is copied in the city patent. [Tr. fol. 45.] The patent to plaintiff in error positively includes the premises in controversy. [Tr. fols. 52-3.]

This court in *Irvine v. Marshall*, 15 L. Ed., on p. 996, said:

"It cannot be denied that all the lands in the territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes and by such titles, as the government may deem most advantageous to the public *fisc*, or in other respects most politic. *This right has been uniformly reserved by solemn compacts upon the admission of new states* and has heretofore been recognized and scrupulously respected by the sovereign states, within which large portions of the public lands have been comprised and within which much of those lands are still remaining. * * * [P. 997.] "But as

the control, enjoyment, or disposal of that property, must be exclusively in the United States, anywhere, and everywhere within their own limits, and within the powers delegated by the constitution no state, and much less can a territory (yet remaining under the authority of the federal government) interfere with the regular, the just and necessary powers of the latter."

The above is approved in Gibson v. Chouteau, 20 L. Ed., on p. 536, and the court adds:

"*The same principle which forbids any state legislation interfering with the power of congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title, etc.*"

And our state court in the case of Lux v. Haggins, 69 Cal., p. 372-3, says:

"But the United States has undertaken to clothe him with the title to the land with the appropriate use of the water as a part of the land. Would not a state law which in advance of the grant, should attempt to take from the grantee the flow of the stream acquired from or sought to be conveyed by the United States, and confer the waters on one who has acquired no right to them from the United States, be an interference with the primary disposal of the public lands?

"But when the state is prohibited from interfering with the primary disposal of the public lands of the United States, there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantee its full and complete title to the lands granted with all its incidents."

And on p. 377, says:

"Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estate granted in such lands, granted under the laws of the United States."

In More v. Smaw, 17 Cal. 199-226, Field, then Chief Justice, delivering the opinion of the court as to the effect of the United States patent for a confirmed Mexican grant, said, on pp. 224-5:

"There is nothing in the act restricting the operation of the patents thus issued to the interests acquired by claimants from the former government, or distinguishing the patents in any respect from the general class of conveyances made, under that designation, by the United States. * * * Such being the case, the question arises as to what passed by the patents to the Fernandez and to Fremont, *and to this question there can be but one answer: All the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land; and that term, says Blackstone, includes not only the face of the earth, but everything under it or over it. And, therefore, he continues, if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters and his houses, as well as his fields and meadows. (Book 11, 19.) Such is the view universally entertained by the legal profession as to the effect of a patent from the general government."*

And on p. 226:

"The construction given by the United States to their patents, ever since the organization of the government, has uniformly been to the same effect. * * * They have uniformly regarded the patent as transferring all interest they could possess in the soil, and everything imbedded in or connected therewith."

In case of Los Angeles Farming and Milling Co. v. Thompson *et al.*, 117 Cal. 594-604, the effect of this same patent was fully considered by that court, which said, on p. 601:

"The patent from the United States established the title of the patentee to the lands embraced within the survey contained therein, and it was admitted at the trial that whatever title to the property described in the complaint passed from the United States by the patent had become vested in the plaintiff."

The same facts are stipulated. [Tr. fol. 53.] (XII.) "At the time of the commencement of this action, and trial thereof the defendant, The Los Angeles Farming and Milling Company owned all of the right, title and interest that was ever owned by the patentee of said rancho under said United States patent therefor so far as it relates to the land owned by said defendant and described in the complaint and answer herein."

On writ of error to this court, Thompson v. Los Angeles Fr. & M. Co., 45 L. Ed. 432-6, the court said, on pp. 334-5:

"Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it certainly was the purpose of the act of 1851 to give repose to titles."

The latter part of section 13 of the act gave the city or any one else having an adverse claim to this grant, the right to come before the United States District Court and have it adjudicated, as a contest, in that case. But it never did so [Tr. fol. 53], and its day in court is ended, barred, estopped, it is *res adjudicata*.

When, therefore, the patent under which plaintiff in error holds was stipulated in evidence and that it included the premises in controversy, and that the title under the patent was in this plaintiff in error, and that the patents to the city did not embrace the land, and that the land in controversy was ten miles above the city, and above any of the points of diversion of water by the city, and that this plaintiff in error and its predecessors in title had been in the exclusive use and possession of the premises for over sixty years, judgment should have been ordered for the plaintiff in error, the defendant below.

This was declared to be the law by this court in *Knight v. United Land Co.*, 35 L. Ed., on p. 988:

"When the patent to the city was brought be-

fore the referee, and it was conceded that the land in controversy was included within the boundaries embraced by the survey embodied in it, judgment should have been rendered for the defendant."

The state court, therefore, was in error as set out in the seventh assignment of error.

Eighth Assignment of Error.

Eighth: The said court erred in its said judgment, in adjudging that the various acts of the legislature of this state, purporting to convey to the city of Los Angeles the legal title of the premises in controversy, pleaded as null and void, in said defendant's answer (plaintiff in error) [Tr. fols. 22-3] and stipulated in Tr. fols. 27-8 and fols. 57-8, conveyed the legal title to the premises in controversy to the city of Los Angeles, and were valid therefor; the said acts being null and void and contrary to, and in violation of the 3rd section of said act of congress admitting the state of California into the Union, approved Sept. 9, 1850, as pleaded in this defendant's (plaintiff in error) answer in said cause as shown in Tr. fols. 22-3, and that the state of California was in line of the titles in controversy herein, and had the title to convey by said statutes. Said statutes of the state of California are repugnant to said treaty, acts of congress and Sec. 1, Art. XIV of the constitution of the United States, under which this defendant specially set up and claimed title herein, and said judgment is in favor of the validity of said state statutes, and is in error thereby. [Tr. fol. 127, p. 55.]

It hardly seems credible that the state courts could have held as assigned as error, yet the trial

court adjudged that nothing in the answer alleged constituted a defense. [Tr. fol. 70.] The invalidity of the acts is pleaded in the answer. [Tr. fols. 22-3.] The state Supreme Court affirmed this judgment of the trial court.

Without the California acts the city would have no standing in court. There would be nothing even apparently conveying any title to the city.

The act of incorporation passed no title. It merely qualified the city to apply to the United States for such title as the government by act of congress should see fit to convey. The conveyance by its patent under the act was the only transfer of title the city ever received, and it excluded the premises in controversy. [Tr. fol. 45 and fol. 51, p. 22.]

As to the effect of these statutes as conveyances this court in *Devine v. Los Angeles City*, 50 L. Ed., p. 1054, said:

“The state of California was not in the line of such titles, so that the acts of the legislature and charters of the city complained of manifestly did not have the effect of depriving complainants of their property or of impairing the obligation of any contract, but simply conferred on the city such rights in respect to the waters of the river as may have been vested in the state. * * * No act of the legislature * * * can *diminish* or *change* the rights of the defendants in these lands derived from their predecessors, the Mexican and Spanish grantees. * * * The legis-

lature of California could *grant nothing* to the city of Los Angeles that belonged to others. * * * The validity of the statutes, on account of repugnancy to the federal constitution, was not drawn in question in the trial court, nor in the Supreme Court of the state, and *both courts held that they neither granted to the city nor took away from plaintiffs in error any rights of property.*"

In the case at bar the federal questions are all raised by the answer.

The Supreme Court of California held the same in *City of Los Angeles v. Pomeroy*, 124 Cal. on p. 638-9, as quoted above by this court in the Devine case.

The state court in *Vernon Irr. Co. v. Los Angeles City*, 106 Cal., on p. 252-3, says:

"I cannot see that the city has acquired any further rights to water by the acts of the legislature referred to."

That court then proceeds, on pages 252-3, to itemize each of said acts of the legislature and says, on p. 253:

"It will hardly be claimed that the legislature could *grant to the city the waters of the river so as to deprive riparian owners of it.*"

Therefore, it being a question of law that the state of California did not convey any riparian water rights to the city of Los Angeles, by its statutes, and also that the United States never made such a conveyance (it being excluded from

the city patent, Tr. fols. 45 and 51), *from whom did the city get a title at the time of its incorporation in 1850?* Prior to that date defendant in error, or the state of California, *did not exist.* Neither can any one point out *any document in the stipulation of facts, that designates the defendant in error, the city of Los Angeles, created April 4, 1850, as grantee of the premises in controversy, now included in the patent to the predecessors of plaintiff in error, and excluded from the government patent to the city, the defendant in error.*

The state courts were in error in the case at bar as fully set out in assignment of error eighth.

And under the stipulated facts, and pleadings in this case the defendant in error can show no purported conveyance for the premises, except those null and void statutes of the state.

The stipulated grant under the laws of Spain in 1781 to the Spanish Pueblo de Los Angeles [Tr. fol. 26] does not name as a grantee the defendant in error created April 4, 1850, over seventy years thereafter, and under a different sovereignty. The stipulation is that said grant only continued *until* the acquisition of California by the United States, which was by conquest, July 7, 1846, and by treaty with Mexico February 2, 1848. At that date it ceased to exist in the pueblo which as a political subdivision of Mexico ceased, and the legal title vested in the United

States, subject to such action as congress should direct.

Congress by act of March 3, 1851, to *ascertain and settle* the private land claims in California, directed by section 8 of said act, that *all* claims derived under the laws of Spain or Mexico should be adjudicated, and under section 11 that the adjudication should include all rights:

"Under the treaty of Guadalupe Hidalgo, the laws of nations, *the laws, usages, customs of the government from which the claim is derived, the principles of equity,* and the decisions of the Supreme Court of the United States, so far as applicable."

This act was in itself a suit by the United States to quiet its title to all lands in California.

The said grant of 1781 to the old Spanish pueblo was submitted, adjudicated and rejected under said act and a patent on its face reciting the rejection issued to the city, and thus under section 13 of said act vanished the old Spanish grant named in the stipulation of facts, leaving the legal title clear in the United States. Under section 15 of said act of congress the said patent to the city became conclusive against the city, and in favor of the United States for all of the domain and property rights outside of the four square leagues of land described in the city patent. It was *res adjudicata and final.*

The state courts were in error, therefore, in holding that said acts of the legislature conveyed

any title to the premises in controversy to defendant in error, as set out in said eighth assignment of error.

Ninth Assignment of Error.

Ninth: The said court erred in its said decree and judgment in adjudging that the said United States patent to the city of Los Angeles, and the said proceedings of the tribunals under said act of congress of March 3, 1851, resulting in the issuance of said patent, were not conclusive against any and all claims of the city of Los Angeles by virtue of any right, title, interest or claim derived from the Spanish or Mexican government, in or to lands or any part or parcel thereof in California lying outside of the premises described in said patent, and especially to the land of this defendant (plaintiff in error) which are stipulated [Tr. fol. 51] as not included in said patent, and [Tr. fol. 53] as being "some ten miles above the city of Los Angeles." [Tr. fol. 128, p. 55.]

The stipulation of facts shows a complete adjudication under the act, as appears from judgment roll in that case, which is stipulated in evidence in this case, and shows as follows:

It is stipulated [Tr. fol. 25] that under the laws of Spain the old Spanish pueblo had certain grants relating to the premises in controversy. And that they were submitted, in the manner designated, to the commissioners under the act and were not submitted in any other manner. [Tr.

fol. 26.] The extent of that submission is shown by the records of that case stipulated herein.

The petition of the city and proceedings are set out in full in the stipulation of facts. [Tr. fols. 28-51.] The petition was filed October 26, 1852.

It alleges [Tr. fol. 29] that the city of Los Angeles was incorporated under the act of the legislature of California April 4, 1850, and that said act provided that "*it should succeed to all rights, claims and powers of the Pueblo de Los Angeles in regard to property.*"

The act is set out in full. [Tr. fols. 27-8.]

Here was pleaded and put in issue the statute of California of 1850 as a conveyance of all the *property rights, claims and powers* of the old Spanish pueblo and of its various grants, or claims. This was submitted for the adjudication of the land commissioners.

The petition alleges that the city claims in virtue of the general laws of Spain, and particularly under the ordinance of his majesty the king of Spain, providing for the establishment of the town of Pitic in Sonora, made applicable to the Pueblo de Los Angeles, etc., and that a copy of the plan of Pitic is attached with a translation thereof. The order of Governor Phelipe de Neve, of 1781, and of Governor Fages, of 1786, were also pleaded. [Tr. fols. 33-9.]

Here was pleaded and put in issue by the city all rights and claims of the city as successor of

the old pueblo under the general laws of Spain and under said special plan of Pitic, as well as said orders of the governors of 1781 and 1786. These were adjudicated.

The petition also alleges "that all the lands in the neighborhood are subject to their claim, and have always been so granted and held."

Here was pleaded and put in issue the paramount claim of the city, unlimitedly, over all lands in the neighborhood, which necessarily included the lands in controversy as well as the entire watershed of the Los Angeles river. This was adjudicated.

The petition alleges "that no record of any judicial possession can be found of the pueblo property, nor were its boundaries ever established." [Tr. fol. 31.]

It therefore alleges an inchoate or imperfect grant, that had never been segregated from the public domain of the former governments.

The legal title, the subject of this action, had never passed out of the former governments to the old pueblo, but passed by the treaty to the United States.

This petition being filed October 26, 1852, over two years after the incorporation of the city, April 4, 1850, thus alleges the *facts* that show that the defendant in error, the present city of Los Angeles, *was not the owner of the legal title* to any property under the laws of Spain or Mex-

ico at the date of its incorporation, April 4, 1850, as alleged in its complaint in this case. [Tr. fol. 7.] (III.)

It neither alleges or claims that it has since acquired such title, and makes no pretense of any conveyance from the United States of any such legal title at any time.

And the petition alleges [Tr. fol. 32]: "They herewith submit the aforesaid documents and rely on the same, and upon such other and further documentary and oral testimony as they may advise as is necessary. And pray confirmation of their claim, etc."

Thus was submitted to the tribunals under the act of March 3, 1851, all rights claimed by the city under the act incorporating it in 1850, as well as all of the old pueblo property rights under the laws of Spain of every character, and specially under its entire plan of Pitic, the order of Governor Phelipe de Neve and Governor Fages [Tr. fol. 29], copies of all of which were before the land commissioners as part of the petition of the city. They were all considered and adjudged by the land commissioners.

Having been thus submitted, what was the scope of the jurisdiction of the commissioners?

This is fixed by section 11 of the said act of congress of March 3, 1851, as follows:

"Sec. 11. That the commissioners herein provided for, and the District and Supreme Courts,

in deciding on the validity of any claim brought before them under the provision of this act, shall be governed by the *treaty* of Guadalupe Hidalgo, the *law of nations*, the *laws, usages and customs* of the government from which the claim is derived, the principles of *equity*, and the decisions of the Supreme Court of the United States, so far as applicable."

The jurisdiction was complete as to all rights, whether under the *treaty*, *law of nations*, *laws, usages and customs* of the former governments or *equity rights*. All were to be adjudicated. Nothing omitted.

In U. S. v. Frossat, 16 L. Ed., p. 186, the court says of this act:

"This jurisdiction comprehends *every species of title or right*, whether inchoate or complete, whether resting in contract or evidenced by authentic act and judicial possession."

To the same effect are the cases of:

Mitchell v. Furman, 45 L. Ed., p. 611;

Castro v. Hendricks, 16 L. Ed. 576;

Castillero v. U. S., 17 L. Ed., pp. 360 and 376;

Beard v. Federy, 18 L. Ed., p. 92;

Grisar v. McDowell, *Id.*, p. 867;

Lynch v. De Bernal, 19 L. Ed., p. 715;

Moore v. Steinbach, 32 L. Ed., p. 55.

Even if the pueblo had possessed a title as perfect as was stipulated in Botiller v. Dominguez,

32 L. Ed. 926, still it must be presented, or be deemed null and void.

Or if as intangible and abstract as the claims of the Indians in Barker v. Harvey, 45 L. Ed., p. 963, existing under the laws, usages and customs of Spain and Mexico, the commissioners had full and complete jurisdiction.

Having this complete jurisdiction, the commissioners rendered an opinion or finding of facts, reciting the facts of the incorporation of the city of Los Angeles under the legislative act of April 4, 1850, and the claim of the city thereunder, and under the laws of the former governments, to succeed to "*all the rights, claims and powers of the Pueblo de Los Angeles.*" [Tr. fol. 40, p. 17.]

On February 5, 1856, the commissioners made its final decree (stipulated herein as a fact, Tr. fol. 43), and confirmed the city claim to the extent of four square leagues of land, and the decree adds [Tr. fol. 43]:

"And as to the remaining premises described and claimed by them in their petition to the commissioners, it is adjudged that their claim is invalid, and their application for a confirmation thereof is therefore rejected."

Therefore all claims of the city of Los Angeles as successor of the pueblo, under the laws of Spain or Mexico, and under the California act of 1850 incorporating the city, were rejected except four leagues of land.

The California Supreme Court erred when it said of the foregoing adjudication [Tr. fol. 96] that:

"The commissioners rendered a decision in which they held that the city was entitled to said pueblo lands, but that they embraced only four square leagues, and the claim of the city to the *other part of the alleged sixteen leagues was rejected.*"

Everything presented or that the city could claim as successor of the pueblo was adjudicated and rejected, except four square leagues of land.

This decree became final and was copied into the patent [Tr. fol. 45] and the decree and patent became conclusive against the city under section 15 of said act of March 3, 1851.

And this patent to the city, "was simply a record of the action of the government upon the title of the claimant *as it existed upon the acquisition of the country.*" Beard v. Federy, 18 L. Ed., p. 92. The city therefore had no title to any other property than as shown by its patent, which excluded the premises in controversy.

Thereafter under section 13 of the act all the property outside of the city's four square leagues of land was "deemed held and considered as part of the public domain of the United States."

On this subject the court, in U. S. v. Fassatt, 16 L. Ed., on p. 186, said, as to section 8:

"And it will at once be understood that those

comprehend all private claims to *land in California*.

"The effect of the inquiry and decisions of these tribunals upon the *matter submitted is final and conclusive*. If unfavorable to the claimant, the land shall be *deemed held and considered as part of the public domains of the United States*, but if favorable the decrees rendered by the commissioners or the courts shall be *conclusive between the United States and the claimants*.

"These acts of congress do not create a voluntary jurisdiction that the claimant may seek or decline.

"*All claims to land* that are withheld from the board of commissioners during the legal term for presentation are treated *as non existent, and the land as belonging to the public domain*. * * * This jurisdiction comprehends every species of title or right, whether inchoate or complete, whether resting in contract or evinced by authentic act and judicial possession."

All of these proceedings, decrees and patents are pleaded by plaintiff in error, as defendant in the trial court, in its answer as *res adjudicata*, as a bar and as an estoppel to this action. [Tr. fols. 20-21.]

This court in Moore v. Steinbach, 32 L. Ed. on page 55, declared this to be the law:

"Certain it is a party presenting his claim is bound by the adjudication of the board. After submitting his claim to its examination and judgment, he cannot afterwards be heard to say that in adjudicating upon his title the board erred. * * * *He cannot repudiate a jurisdiction to which he has appealed, and the estoppel extends to parties claiming under him*."

And in U. S. v. Fassatt, 16 L. Ed., on p. 186, the court said:

"The effect of the inquiry and decisions of these tribunals upon the matter submitted is *final and conclusive.*"

The act of congress of March 3, 1851, was in itself an action by the United States to quiet its title to lands in California as well as to fulfill its treaty obligations. It provided the tribunals, and designated the subject matter of the action.

Section 8 is in legal effect a complaint and summons. Section 13 designates the character and effect of the judgment, and that judgment by default would result in the extinguishment of non-presented adverse claims. Section 15 declared the adjudications and patents as conclusive.

The entire result was that the government owned nothing inside of lands that went to patent, and equally that no patentee owned any interest in the lands outside of his patent, and as to them, and as to all who did not present their claims, the legal title of the United States was quieted.

The proceedings became *res adjudicata* and is so pleaded in this action as a complete defense. [Tr. fol. 20-1.]

The trial court denied this defense. [Tr. fol. 70.] The state Supreme Court affirmed the judgment, and by the assignment of error ninth the

question is submitted to this court for its decision as being contrary to the validity, force and effect of said act of congress, and of the said proceedings, decrees and patent of said tribunals under said act.

Note: Some fifty years subsequent to this federal adjudication of the property rights of the city of Los Angeles under the act of incorporation of the city of April 4, 1850, and under the general laws of Spain, and under the plan of Pitic, and the order of Governor Phelipe de Neve, of 1781, and Governor Fages, of 1786, rejecting the claim of the city for all property rights outside of four square leagues of land, the California courts in Lux v. Haggan, 69 Cal., Vernon Irr. Co. v. Los Angeles City, 106 Cal. and the City of Los Angeles v. Pomeroy, 124 Cal. and the case at bar proceeded to readjudicate the whole question and specifically *named the foregoing adjudicated documents as the basis of their judgment, directly the reverse of the former federal adjudication of the same documents under the act of congress of March 3, 1851*, to ascertain and settle the legal effect of those and all other documents under which the city might assert any claim to property as successor of the Pueblo de Los Angeles.

This subject is fully considered under the eleventh assignment of error. (Post, p. 89.)

Tenth Assignment of Error.

Tenth: Said court erred in its said judgment in adjudging that "said plaintiff (the city of Los Angeles), is the owner in fee simple, of the paramount right to take and use all of the waters of said Los Angeles river (as well its branches, as the main stream and including all of the underground waters in said land of defendant, from the surface of the ground down to bed rock) from its sources to the southern boundary of said city of Los Angeles, so far as may be reasonably necessary, from time to time, to give an ample supply of water for the use of its inhabitants and for all municipal and public uses and purposes," "for which said city and its inhabitants may require water within the limits of said city of Los Angeles, *as such limits may exist at the time of such taking and use,*" and that defendant (plaintiff in error) has no right to the use of said waters or any part thereof in its said lands, described in said patent from the United States except in subordination to said paramount right of said city of Los Angeles.

And said court erred in that, said judgment does not limit said right to the original pueblo limits of 17,500 acres, but extends it to some 10,400 acres of outside non-riparian arid lands, already added to the original pueblo four square leagues, and as well extends said right to cover all future additions of land to said city's area, against the just rights of this defendant (plaintiff in error) in the premises aforesaid. Said judgment therein being contrary to the validity, force and effect of said acts of congress, and decrees and patents thereunder, and of Sec. 1, Art. XIV of the constitution of the United States, and is error therein. [Tr. fol. 128, p. 55.]

This assignment of error is directed to the fact that the state court decreed that the right of the city to *take and use all* the waters of the river, existed not only as to the old pueblo and patented area of four square leagues, but "*as such limits may exist at the time of such taking and use.*" [Tr. fol. 72.] This area has been increased over 10,500 acres by adding outside lands. [Tr. fol. 54.]

This error is the basis of the dissenting opinion of Chief Justice Beatty. [Tr. fols. 105-6, p. 45-6.]

The entire argument of the state court in the case at bar on which this error rests is based upon a process of construction of the supposed Spanish grant extending it beyond the words of the grant. It is a settled proposition of law that grants from the sovereign are to be construed in favor of the sovereign, and not in favor of the grantee. That is whatever is not competently and clearly described as conveyed, remains in the sovereign.

Apply this rule and the error of the state court at once appears. The state court's decision on its face shows that it is based purely on construction, presumption, supposition, and inference, and is not, and does not even purport to be based on any alleged language of any law whatever, Spanish, Mexican, or American, and is

without precedent authority in any of those sovereignties.

Under this decree already over 10,000 acres of non-riparian, non-pueblo lands have been added to the old pueblo limits and given water rights which it never had, and that water was *taken from* the riparian owners on the stream who have used it on their riparian Mexican grant, patented lands, for over a hundred years. Not only this, but it *takes* such water from the public lands, on which the streams, branches, tributaries and sources are located.

Of course the decision of the state court does not, *per se*, or of its own force, bind the United States, but if the Supreme Court of the United States affirms this judgment, the United States will be bound, for there is no further appeal, and all similar decisions by the state court would be affirmed and execution would issue accordingly.

As stated by the chief justice, the city could take in by annexation all the adjacent lands from the city to the ocean, and give them the water, which it would *take* from the San Fernando valley land owners.

As a basis for speculation the decree is grand.

The damage in the case at bar on some 10,000 acres of the valley land is stipulated to be over \$400,000. [Tr. fol. 53.] And the total area to be deprived of water embraces some 800 square miles [Tr. fol. 57 and Ex. A, p. 39], or some

fifty times the area in this case, which alone would represent some \$20,000,000 as the water value of the area covered by the city's claim, and judgment of general ownership.

This water added to outside arid lands added to the city, under the right to *take* it, as by this decree, would add a speculator's profit of the above or even greater amount.

This is taking private property for public use without due process of law (by condemnation) and without any compensation, and is a denial of the equal protection of the laws to this defendant, under Sec. 1, Art. XIV, of the federal constitution, as fully specified in the assignment of error.

Eleventh Assignment of Error.

Eleventh: The said court erred in its judgment, in that it held the decisions of said court in Lux v. Haggin, 69 Cal. 255, and Vernon Irrigating Co. v. City of Los Angeles *et al.* (106 Cal. 237), and City of Los Angeles v. Pomeroy, 124 Cal. 597 (to none of which cases was this defendant or its land a party), to be determinative of the prior and paramount right of the pueblo and the city of Los Angeles, to the use of the waters in this defendant's lands, as against this defendant, it not having been in the jurisdiction of said cases, and the facts being materially different.

Whereas, said court should have adjudged that the constitution and laws of the United States aforesaid and patents thereunder in the premises, and the pleadings and stipulation of

facts in said case were alone determinative of the rights of this defendant (plaintiff in error), in this action, as stipulated by counsel in this case [stipulation XXVII, Tr. fol. 59], and said court erred in not so adjudging and determining the rights of this defendant (plaintiff in error), in said cause on the merits of this case as presented in the record thereof. And said court thereby erred and denied to this plaintiff in error equal protection of the laws, and by said judgment deprived plaintiff in error of property of the value of over \$400,000 without due process of law, in said case, and said Supreme Court had no original jurisdiction to apply the facts in said cases, the same not having been introduced in evidence in this case. All of which is contrary to Sec. 1, Art. XIV of the constitution of the United States. [Tr. fol. 129, p. 56.]

The foregoing assignment of error is based on the following statements in the decision of the California Supreme Court, where the court, after reviewing said state decisions, says [Tr. fols. 94-5]:

"The case was submitted on a stipulated statement of facts * * * and if the stipulated facts warrant a judgment it should stand. (Higgins v. San Diego Bank, 120 Cal. 184; McMenomy v. White, 115 Cal. 339.) It is not necessary to recite here in any great detail *the facts as stipulated*. Indeed the situation of the city of Los Angeles with respect to the Los Angeles river, and its claim to the use of the water of the river, *have been fully stated in former opinions of this court and are familiar facts.*"

And at Tr. fol. 99, p. 43, the court says:

"The only question in the case therefore is whether under the general law of the locality the old pueblo of Los Angeles, and respondent herein as its successor, had, and have, as against appellant, the prior and paramount ownership, etc.
* * * *And this question need not be discussed as an original one, for it has been answered in the affirmative by former decisions of this court.*"

After reviewing said cases the court says [Tr. fol. 102]:

"The foregoing decisions are determinative of the prior and paramount right of the pueblo, and of the plaintiff as its successor to the use of the waters of the river, etc."

The Supreme Court of California is one of appellate powers. It has no original jurisdiction to substitute facts or its supposed knowledge of facts, not introduced in evidence in the trial court. It can only review a case *on the facts introduced in evidence in the trial court*, where all parties have the legal opportunity and right to object to their admissibility, and to introduce rebutting evidence, as well as to show that translation of foreign laws and documents are, or are not, correct.

By the state constitution, Art. VI, Sec. 4:

*"The Supreme Court shall have appellate jurisdiction * * * in all cases at law which involve the title or possession of real estate."*

And Art. VI, Sec. 5:

"The *Superior Courts* shall have *original jurisdiction* * * * in all cases at law which involve the title or possession of real property."

Sections 52 and 76 of the Code of Civil Procedure of this state use respectively the same language as the above as to the jurisdiction of said courts.

In the trial court all the facts were stipulated, and all other facts were excluded by stipulation XXVII [Tr. fol. 59] for a valuable consideration as follows:

"It is further stipulated that, in consideration of the disclaimer by the plaintiff of any interest in the lands described in the amended cross-complaint herein, *the case, made on the complaint and answer, shall be submitted and decided on the foregoing stipulation of facts without any further evidence on the part of either party, and such stipulation of facts is hereby made irrevocable.*"

The consideration of the facts in the cases, referred to by the state Supreme Court and made determinative of this case, were thus irrevocably excluded from this case. This plaintiff in error as defendant below was therefore entitled to a decision on the case as made by the complaint and answer and the stipulated facts of this case, and *nothing else*, and it was a denial of due process of law, and of equal protection of the law, to determine its property rights on the materially different facts and issues of other cases, to which

neither this plaintiff in error, nor its lands, were party, and which were not offered in evidence in the trial court in this case, but were excluded.

In Green v. Co. Fresno, 95 Cal., pp. 333-4, the court says:

“The consideration of the court was restricted to the facts admitted and its judgment *could not be based upon any other facts* which it may have supposed the plaintiff could establish.”

And in Scott v. Dyer, 54 Cal. 430:

“*Held*, in view of the stipulation in this case, that certain questions only were involved—that other questions could not be considered.”

The facts and issues in those cases were entirely different from the case at bar, and are not even authority herein on *pueblo rights*, much less determinative of this case, as an examination will conclusively show.

The first is the case of Lux v. Haggin, 69 Cal. 255, which is the foundation of the other two, and of the state court's decision in this case.

We will cite the pages of that case for the following facts therein.

The case arose in Kern county, Cal. (p. 259), some *two hundred miles distant from Los Angeles*. Neither party to this case was a party in that case (p. 265). The issue was stated by the court, to wit., on pp. 264-5:

“The question being, can a private corporation

divert the waters of a water course, and thereby deprive the riparian proprietors of all use of the same, without compensation made or tendered to such proprietors? Held—

“1. The owners of land by or through which a water course naturally flows have a right of property in the waters of the stream.

“2. This property may be taken for a public use, just compensation being first made or paid into court.

“3. But one private person cannot take his property from another, either for the use of the taker or for an alleged public use, without any compensation paid or tendered. (Const., Art. 1, Sec. 14.)

“4. Riparian owners may reasonably use water of the stream for the purposes of irrigation.” (Pp. 264-5.)

No pueblo rights were involved in that case; in fact no pueblo ever existed within a hundred miles of that stream.

On p. 332, the court says:

“We take notice that no pueblo existed on the watercourse (if any there be) which is the subject of the present controversy.”

And on page 334, the court says:

“No city or pueblo existed on the alleged stream, and at the trial hereof no evidence was given of any special or general custom with respect to the particular stream or with respect to all rivers in California. No general custom existed. Moreover, if it had ever existed it would have only continued until abrogated by legislation.”

On April 13, 1850, the state adopted the common law, including riparian rights, and on April 22, 1850 (St., p. 342), the legislature enacted:

"That all laws now in force in this state, except such as have been passed or adopted by the legislature, are hereby repealed."

And all Mexican laws relating to the public domain ceased with the treaty.

The entire remarks of that court on pueblo rights as to water is purely *obiter dictu*, and were wholly extraneous, to the issues, evidence, or facts of that case.

But the court in that case states the extraneous, and *ex parte* source from which it derived its supposed facts as to pueblos.

On page 326 the court says:

"A translation of the plan of Pitic is annexed to Dwinelle's Colonial History of San Francisco. (Addendum, No. 7.) *The original is not before us.* Whether the plan of Pitic is or is not a scheme in all respects applicable to every pueblo created after the date, November 14, 1789 (as claimed by counsel), it may be conceded the provisions therein contained were, in substance, *those having force in the pueblos established in California, while it was a part of the territory of Mexico.*"

Dwinelle, speaking of the said translations attached to his said Colonial History of San Francisco, one of which was used by the court as above, says on p. 6:

"Many of the translations are absolutely gro-

tesque in their solecisms, and want of accuracy, frequently obscuring, and often reversing the sense of the originals, but these are the translations which both suitors and the United States were formerly obliged to accept, at the hands of some of the official translators, who, it is to be hoped, understood Spanish, for they certainly did not understand English."

Thus the documents used by the court were discredited *prima facie*.

Now it is a fact that the translation of the plan of Pitic in Addenda No. 7 of Dwinelle's Colonial History of San Francisco, the same used *ex parte* by the state Supreme Court in Lux v. Haggin, *supra*, is one of the translations, "reversing the sense of the original," relating to pueblo water rights, and thereby leading the state Supreme Court into the error of announcing pueblo water rights just the reverse of what they are under the plan of Pitic.

The court having referred to it, we are not traveling out of the record by reproducing said erroneous translation of Sec. 7 of the plan of Pitic, from said Dwinelle's Colonial History of San Francisco, to wit:

"7. The residents and natives shall enjoy equally the woods, pastures, *water privileges*, and other advantages of the royal and vacant land that may be outside of the land assigned to the new settlement, in common with the residents and natives of the adjoining pueblos, which bounty and privilege shall continue as long as they are not changed or altered by His Majesty, in which

case, they shall conform to that which has been provided in the royal orders, that may be issued in favor of the new possessor or owners (proprietarios)."

A glance at the above shows that the entire water of the streams are given to the *residents and natives* of the pueblos on the streams, and the state court evidently in Lux v. Haggan followed the erroneous translation. They had no other, and state they did not have the original.

The *true* translation is *stipulated as a fact in this case*. It was produced in evidence by the counsel for the city in this case, and is a certified translation from the archives of the U. S. surveyor general at San Francisco. It was also attached to, and as a part of the petition of the city of Los Angeles to the commissioners under the act of congress of March 3, 1851, for confirmation of the city's claim under the laws of Mexico. [Tr. fols. 35-39.]

This stipulated correct translation of Sec. 7 is set out on Tr. fol. 36, as follows:

"7th. The *neighbors* and natives shall likewise enjoy the use of the woods, *waters* and other benefits from the royal and vacant lands *lying outside of the tract assigned to the new town jointly with the residents and natives of the immediate and adjoining towns*, which favor and right shall continue until by His Majesty the same shall be granted and alienated, in which case regulations will be made according to the

provisions for concessions in favor of new possessors or proprietors."

The plan of Pitic, and as pleaded by the city before the U. S. land commissioners, as stipulated correct as above, recognizes the rights of *three classes* of persons. (1) The neighbors and natives outside of the new pueblo; (2) the *residents* of the new town or pueblo; (3) the residents of the other pueblos on the stream, *jointly* to use the woods, *waters*, etc., on the "royal and vacant lands lying outside of *the tract assigned to the new town.*"

The use of the waters of the entire streams outside of the new pueblo were for the joint use of all pueblos, and of all the neighbors thereof. The error in the translation of Dwinelle's Addendum No. 7 is translating the word "*vicenos*" in the first line of the Spanish text, into the English word "*residents*," instead of "*neighbors*," thereby reversing the meaning of the original text.

It would appear from a reference by this court in U. S. v. Santa Fe, on p. 882, that the court used the same Dwinelle's History of San Francisco, in reference to the plan of Pitic. As it does not contain the original Spanish text, we furnish the following copy of Sec. 7, taken from the one attached to the petition of the city of Los Angeles to the board of land commissioners.

[Tr. fols. 35-39.]

On Tr. fol. 33 it is stipulated that the courts may take judicial notice of the plan of Pitic and that either counsel "may furnish a printed copy of such additional portions in the printed brief on appeal or writ of error."

The Spanish text is as follows:

"7°. Ygualmente disfrutarán los vecinos y naturales de los montes, pastos, aguas, y demás aprovechamientos de las tierras realengas y Validas que huvieren fuera del terrano senalado a la nueva Poblacion en comunidad con los vecinos y naturales de los Pueblos immediatos y colindantes, cuya gracia y facultad subsistira hasta que per S. M. se mercenen o enagenew, en cuyo caso se arreglaran a lo que se previniese en las mercedes que se expidan a favor de los nuevos poscedores o proprentarios."

The word "vicosos" is twice used in the original text, correctly translated as "neighbors." The text recognizes the common right of the neighbors and natives outside of the new pueblo, and of the "neighbors and natives" of the immediate and adjoining pueblo, as well as the new town to the use of the woods, pastures and waters on the outside vacant royal lands.

In fact their rights were the same as the residents of frontier towns on unsurveyed public lands of the United States, have in common with all others to the use of the public woods, pastures, waters, etc., until the United States otherwise disposes of them.

As well might the city claim the "title in fee simple" to all the woods, pastures, waters, and other benefits from the royal and vacant lands outside the pueblo, as to claim the title for any one (the water) in particular.

All these documents, original text, and translations were before the board of land commissioners and the claim of the city thereunder rejected as invalid.

This permissive common use continued only until such time as by His Majesty the same shall be granted or alienated, when new provisions would be made as required by the new cessions.

The *legal* title, therefore, so far as pueblos were concerned and right of disposition, remained absolutely in the King of Spain, and passed to the republic of Mexico, and thence by treaty to the United States, and by its patent to plaintiff in error (as pleaded in the answer) [Tr. fols. 13-14], and the defendants in error sets up no claim to any title from the United States [Tr. fol. 51, p. 22], and had no *legal title* to quiet.

The state Supreme Court in *Lux v. Haggin*, *supra*, p. 329, speaking of *Los Angeles City*, says:

"The inhabitants of the former pueblo who were using water when this territory was transferred to the United States had not acquired a *vested right to any particular quantity of water*."

It must therefore be apparent, on the face of the court's decision in *Lux v. Haggin, supra*, that it is neither determinative, nor even an authority against this plaintiff in error on pueblo water rights, and that its *obiter dictu* is based on an error disclosed in that record and its reference to the plan of Pitic, and is entitled to no weight, in the case at bar, and when the state court made it determinative of the rights of plaintiff in error herein, it violated Sec. 1, Art. XIV of the federal constitution, and deprived it of property without due process of law, and denied it the equal protection of the laws, in determining *this case*.

The said plan of Pitic was submitted to the land commissioners, by the city of Los Angeles under the act of congress of March 3, 1851, as part of its petition, and it was adjudicated and rejected.

Not only is the said *obiter dictu* in *Lux v. Haggin, supra*, subject to the foregoing errors, but the *identical Spanish and Mexican documents*, which the state court used as the basis of its investigations, were presented for adjudication (in their original text and by certified translations) by the city of Los Angeles to the tribunals under the act of congress of March 3, 1851, as shown by the stipulations of fact in this case [Tr. fols. 33-39], for adjudication by those tribunals.

In *Lux v. Haggin, supra*, on pp. 326-8, the

court not only designates the plan of Pitic, as the document of its investigation of pueblo water rights, but quotes in full Secs. 19 and 20 thereof as to water rights. These identical sections are stipulated in full [Tr. fols. 33-39] as a part of the city's petition to the land commissioners in 1852, as well as all of said plan, and all Spanish or Mexican laws on the subject.

The land commissioners decreed the claims of the city under said sections as invalid and rejected the same.

Yet the state Supreme Court, in an *obitur dictu*, reviewed the same documents and reversed the decree of the land commissioners, and that without any authority from congress conferring jurisdiction on the state court, and make that re-adjudication determinative of the same federal questions in this case. This the state court had no jurisdiction to do, as shown in specification of error No. 4, *ante*, p. 46.

The *obitur dictu* as to pueblo water rights was only judicial legislation, similar to that in Hardin v. Jordan, *supra*, of which this court therein said on p. 397:

"We do not think that the argument *ab inconveniente* is sufficient to justify an abandonment of the rules of the common law, which as we have shown, have been adopted in Illinois. It is too much like judicial legislation. It is as much as to say, 'We think the common law might be improved, and we will therefore improve it.' "

The next case that the California court held determinative of the case at bar is the *Vernon Irr. Co. v. Los Angeles City and Ames and James*, 106 Cal. 237. [Tr. fol. 101.]

Neither this plaintiff in error nor its lands were parties to that action, nor was that case offered in evidence in the trial court in this case.

The plaintiff in that case claimed that by reason of owning some lower riparian lands that it had a right to take water from the river to use or sell on other lands. On p. 242, the court says:

“No portion of the water which it proposes to divert from the stream is to be used on its own lands. That there is no evidence or finding that its lands are susceptible of cultivation, or can be made productive, or that plaintiff is or can be injured as to its riparian lands, though deprived of all the water flowing in the stream.”

And its application for an injunction was therefore denied (p. 243).

The city claimed the right to sell the waters of the river to a large area of non-riparian lands outside of its corporate limits (p. 241-2).

The court denied this claim and says, on p. 244:

“It is not authorized to carry on the business of selling water to outside parties, and its officers are therefore not empowered to appropriate water for that purpose.”

On p. 256, the court reverses the decision of the trial court and orders a new trial. The case

seems to have then been dropped without further trial.

The state Supreme Court on p. 244, takes up the question of the old pueblo rights. In considering this question the court says, on p. 248: "This view was adopted by this court in Lux v. Haggin, 69 Cal. 255," and says, on p. 250: "I am satisfied with the conclusion reached in Lux v. Haggin, *supra*." Thus the erroneous translation of Sec. 7 of the plan of Pitic was carried fundamentally into this Vernon case.

On page 246, the court says:

"Many Spanish and Mexican documents were put in evidence on the trial of the case, and their substance is set out in the statement."

And on p. 250:

"Counsel have furnished me with *translations* of numerous ordinances, laws, rules and regulations of Spain and Mexico relating to this subject."

Whatever the facts may have been in that case as known to the state Supreme Court, they were all excluded from the consideration of the court in this case by stipulation of counsel [Tr. fol. 59] (XXVII).

The state Supreme Court had no original jurisdiction to introduce them in evidence, in the appellate court, in this case.

The pleadings and issues in the Vernon case

were different from the case at bar, and did not involve this plaintiff in error or its lands.

In that case no rights under the treaty, nor under the proceedings, decrees and patents under the act of congress of March 3, 1851, to adjudicate rights derived under Mexican or Spanish laws were pleaded; neither the effect of the third section of act of congress admitting California as a state; nor rights under Sec. 1, Art. XIV of the federal constitution, all of which are specially pleaded and made the sole issue in this case.

This plaintiff in error as defendant below, by the action of the state Supreme Court, was thus denied the right and opportunity to object to the translations of the various Spanish and Mexican *documents*, etc., offered in the Vernon case, and was denied the right and opportunity of offering rebutting evidence, or expert evidence as to the correctness of the translations, or authenticity of the purported originals, and was denied an adjudication of its rights based on its stipulated facts and issues in its case at bar.

The state court in that case, on p. 249, specially designates the order of 1781 of Filepe de Neve, governor, founding the pueblo de Los Angeles, also the order of Aug. 14, 1786, of Pedro Feges, governor of California, on the same subject.

The city of Los Angeles, in 1852, made these same documents a part of its petition to the

United States land commissioners and attached original copies and translations of the same to their petition. [Tr. fol. 29.] These documents appear in this case in the stipulation of facts [Tr. fols. 33-39] as part of the judgment roll in that case, to show the *res adjudicata*.

Of course, under sections 8 and 11 of the act of 1851, all Spanish and Mexican laws, usages and customs, the treaty provisions, the law of nations, the principles of equity, the laws and decisions of the United States, as well as the laws of California, relating to the rights of the pueblo, or of the city of Los Angeles in that case, were before the tribunals under the act of congress of March 3, 1851, to ascertain and settle all rights or titles claimed under the former governments.

These tribunals had exclusive and final jurisdiction. The city of Los Angeles submitted its complete and entire claim unlimitedly and the commissioners rejected as invalid all claims of every character, expressed and implied, and limited the right of the city to four square leagues of land.

The California courts therefore had no jurisdiction of that subject matter in the Vernon case, to review and reverse the former judgment of the United States on the "many Spanish and Mexican documents, laws, ordinances and customs," already adjudicated in those federal tribunals. And to that extent the Vernon and Lux

v. Haggin cases are null and void and are not determinative in this case.

The next case held determinative of the case at bar by the California courts is *The City v. Pomeroy et al.*, 124 Cal. 597, which came by writ of error to this court and is reported under the title of *Hooker v. Los Angeles*, 47 L. Ed. 487. Neither this plaintiff in error nor its lands were parties to that action.

In that case no federal questions were in issue. It is wholly irrelevant to the case at bar, where nothing but federal questions are in issue, and that case was dismissed by this court for want of federal questions.

This court said in that case (47 L. Ed., p. 490):

"We cannot find in the pleadings, or other proceedings, in the trial court, or in the Supreme Court, that any statute of California was asserted to be in conflict with the constitution, or any law, or any treaty of the United States, or that any right was claimed by plaintiffs in error under the constitution, or any treaty or statute of the United States."

And on page 491 (*Id.*) the court says:

"The truth is there is nothing in this record adequately showing that the state courts were led to suppose that any claim under the constitution of the United States was made by plaintiffs in error, or that any ruling involved a decision against a right set up under that instrument."

The same is repeated on p. 492 (*Id.*).

Neither this plaintiff in error nor its lands were party to said Pomeroy Hooker v. Los Angeles City.

Notwithstanding the decision of this court that the Pomeroy case, *supra*, involved none of the federal issues of the case at bar, it used it as determinative of the rights of this case.

In the case at bar the state court, speaking of pueblo rights, says:

“This question ought to be considered closed by the previous decisions in the Vernon Irrigation case and others. *All of the laws and public documents upon which its solution depends are within the judicial cognizance of the courts, and whether they were actually noticed or not in previous decisions, they must be deemed to have been considered and allowed due weight.*”

Under this rule, the adjudication of the federal tribunals under the act of congress of March 3, 1851, was complete on “all of the laws and public documents upon which its solution depends,” as within the judicial cognizance of those courts, and left nothing on that subject for the California courts to readjudicate. And the *case was closed* by that former adjudication as pleaded in the answer herein, and assigned as error. The city having presented its claim, is bound by the decree of the commissioners..

This court in *Moore v. Steinbach*, 32 L. Ed., p. 55, said:

“Certain it is a party presenting his claim is bound by the adjudication of the board. After submitting his claim to its examination and judgment, he cannot afterwards be heard to say that in adjudicating upon his title the board erred. * * * *He cannot repudiate a jurisdiction to which he has appealed, and the estoppel extends to parties claiming under him.*”

“The question of its correctness is forever closed.”

U. S. v. Halleck, 17 L. Ed., on p. 668;

U. S. v. Billings, 17 L. Ed., on p. 848;

Beard v. Federy, 18 L. Ed., on p. 89.

By making state cases determinative of the case at bar, the state court wholly lost sight of the issues and pleadings and stipulation of facts in this case.

The complaint alleges the city to be the “*owner in fee simple of the paramount right to take and use all the waters of the Los Angeles river* (as well its branches as the main stream, and including the underground waters as well as the surface waters of said river) from its sources to the south boundary of said city of Los Angeles,” for all municipal uses, “within the *limits* of said city of Los Angeles, as the same might have existed or may exist at the time of such taking and use.” [Tr. fol. 7.] And the prayer of the complaint is for the same. [Tr. fol. 10.] The judgment of

the trial court is to the same extent. [Tr. fol. 77.]

The whole right in fee, to *all* the waters of the river, for *all* municipal purposes, whenever the city needed it, within the whole city as it *now* or may *hereafter* exist, were in issue and decided.

The state Supreme Court on the above subject says [Tr. fol. 103]:

"The questions as to *what extent* this right goes, a question somewhat considered in the Pomeroy case—that is, for the use of the inhabitants of *what territory*, and for *what municipal purposes can the water be taken* as against a riparian owner—does not arise and need not be considered in the case at bar."

The court thereby states that it has refused to *consider* the only issues in this case, and the stipulation of facts and of submission of the case to the courts for decision, and by considering other issues and conditions in other cases as decisive of this case, has denied equal protection of the laws and due process of the law in adjudicating the case.

The court further says [Tr. fol. 103]:

"Appellant's case is presented *in the record as resting* upon the proposition that neither the pueblo, nor the plaintiff, has or had any *right whatever* to use water of the river that is prior or paramount to appellant's right as a riparian proprietor."

Whereas the *record* shows [Tr. fol. 23] that defendant below in its answer alleges and claims

the riparian right to the "use of said water for domestic and other purposes on said land, *to the extent thereof vested in this defendant by the patents, decrees and acts of congress aforesaid by reason of said waters being a part and parcel of said lands, and having been vested in this defendant by said patents, decrees and acts of congress.*"

Our contention, as pleaded in the record, is that the city of Los Angeles did not at the time of its incorporation under the laws of California on April 4, 1850, nor ever since, nor now, owned or owns the above alleged riparian right of this plaintiff in error, and that it has *no legal title thereto to quiet as the basis and foundation of the judgment below.* The denial and issue appears in the answer, marked 11 [Tr. fol. 21], as follows:

"Denies each and every allegation contained in count or subdivision marked III in plaintiff's complaint."

The complaint not being verified, this general denial is the legal and usual form required under section 437, subdivision 2, Code of Civil Procedure of the state of California.

The state Supreme Court evidently had in mind the foreign issues in the various cases of Lux v. Haggin, Vernon Irrigation Co. etc., *supra*, which were entirely different from the federal issues of defense herein, and expressed a decision

not based on the facts, issues or stipulations or pleadings in this case and were in error as alleged.

The court also adds to the foregoing statements as follows [Tr. fol. 103]:

“And the *present decision would not be authority in a case*, if any such case should ever arise, where the question would be as to the *extent of plaintiff's prior and paramount right*, and not as to the *existence of that right to any extent.*”

We can only reconcile this statement with the presumption that the court had still lost sight of the issues, pleadings and facts of this case, wherein the only issue was whether the city of Los Angeles owned, at the time of its organization under the legislative act of April 4, 1850, and ever since and now owns the *legal title* to the prior and paramount right to *take and use all the waters of the Los Angeles river, etc.*, whenever it needs it for *all* municipal purposes within the city as it now is or may be enlarged to at any future time, and whether the federal issues raised in the answer were a sufficient, *res adjudicata* bar, estoppel and defense.

It was, therefore, error as specified, for the court makes the cases of Lux v. Haggin, Vernon Irrigation Co. and Pomeroy, *supra*, determinative of the case at bar, instead of determining the case at bar by the pleadings and stipulated facts of this case alone, as required by

stipulation submitting the case. [Tr. fol. 59.] (XXVII.)

The state Supreme Court by making these decisions, based on the original erroneous *obiter dictu* of Lux v. Haggin, and the erroneous translation of the seventh section of the plan of Pitic, and on translations of Spanish and Mexican documents in the other cases, and on the wholly irrelevant case of Pomeroy, Hooker, and by considering the facts of those cases determinative of the case at bar, and by refusing to exclude everything except the *facts as stipulated in this case*, has denied this plaintiff in error a trial by due process of law, and has denied it equal protection of the laws, and has deprived this plaintiff in error thereby of over \$400,000 worth of property, as fully set out in the eleventh assignment of error.

The words of the state Supreme Court in Schirmer v. Drexler, 134 Cal. 139, seem applicable:

“If this kind of a judgment can be upheld on this kind of a record then written pleadings are no longer necessary, and may well be dispensed with altogether.”

Twelfth Assignment of Error.

Twelfth: The said court erred in its judgment in overruling and denying this defendant's (plaintiff in error) objections to the admissibility in evidence of stipulation of facts XVI, XVII, XVIII, XIX [Tr. fols. 60-9] to attack or vary

the terms or effect of the patents in evidence in this case. [Tr. fol. 130, p. 56.]

The twelfth assignment of error stands or falls with the merits of the case. Its only object was to prevent any question arising as to whether plaintiff in error had waived or impaired any of its federal questions or rights in the lower courts in case the objections to the evidence had not been made or maintained.

Additional Assignment of Error.

Under rule 21 of this court, plaintiff in error assigns an additional error of the state court, as follows:

The state court erred in its said judgment in denying to this plaintiff in error the equal protection of sections 315, 316, 318, 319 of the Code of Civil Procedure of the state of California, as pleaded in the answer [Tr. fol. 57] and as provided in section 1007 of the Civil Code of said state, and as stipulated by the facts [Tr. fols. 52-3] and that said judgment is violative of section 1 of article XIV of the constitution of the United States in denying to this plaintiff in error the equal protection of said laws to his title to said premises vested in him by said laws, and as shown by the stipulation of facts herein.

The material portions of said sections on which reliance is placed are as follows:

Sec. 315. "The people of this state will not sue any person for or in respect to any real prop-

erty, or the issues or profits thereof, by reason of the right or title of the people of the same, unless: 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced."

"Sec. 316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state, unless the same might have been commenced by the people as herein specified, in case such patent had not issued or grant made."

"Sec. 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestors, predecessors or grantor was seized or possessed of the property in question, within five years before the commencement of this action."

"Sec. 319. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits of the same, can be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or defense is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

Sec. 1007 of the Civil Code, is as follows:

"Occupancy for the period prescribed by the Code of Civil Procedure, as sufficient to bar an action for the recovery of property *confers a title thereto*, denominated a title by prescription, *which is sufficient against all.*"

Stipulations of fact XIV [Tr. fols. 52-3] show that all the conditions and facts precedent re-

quired by the foregoing sections exist in favor of the plaintiff in error, to-wit:

"That the value of the premises in controversy is over \$400,000, and that said defendant and their predecessors in interest have paid all taxes or assessments levied on said lands, and have been in the *actual and exclusive possession* of the said land since the granting and patenting thereof, using the same for the ordinary purposes of husbandry, farming and pasturage, claiming to own the same under said grant, decree and patent."

On Tr. fol. 52 (XII) it is stipulated that the grant was made June 14, 1846, and patented January 8, 1873.

Thus for over sixty years this plaintiff in error and predecessors in interest have had this *actual and exclusive possession* and use of the premises, paying all taxes thereon, claiming the ownership, etc. This possession entitled plaintiff in error to maintain this defense under said sec. 319. *Ante.* This actual and exclusive possession and payment of state and county taxes was ample notice to the people of the state and city of Los Angeles of the running of the statute of limitations, and a full compliance with all the requirements of the law, and this under the above section 1007 of the Civil Code "*confers a title thereto, denominated a title by prescription, which is sufficient against all.*"

The *title being vested* in the plaintiff in error, by the law and stipulated facts, is as completely

protected by section 1, article XIV of the federal constitution, as a title vested by a direct deed or by any other process, or conveyance.

Being vested it can only be divested by due process of law and is entitled in the courts of justice to the equal protection of the laws as a *vested title sufficient against all*. The statute law of the state so declares it. In the case at bar the state courts denied it this protection. And such judgment is violative of said constitutional protection and requirements.

This title, thus obtained, even if plaintiff in error could show no other "*is sufficient against all*" and shows that the *legal title* is not in the defendant in error, and it has no legal title to quiet in this action.

The city of Los Angeles is simply a political creation of the state, and holds under the state as its agent. And under the above section 316 [*Ante p. 115*] the foregoing statutory effect runs against the city.

The state of California has full power to grant any of its lands to an actual settler, or any one else upon whatever terms, or conditions precedent it shall designate by legislative act; and a compliance therewith passes the title if the legislature so declares, as in this case, against the state and all others. As in the language of said section 1007, "confers a title thereto * * * which is sufficient against all."

"The statutes of a state prescribing periods within which rights must be prosecuted are not held to embrace the state itself, *unless it is expressly designated*, or that the mischiefs are to be remedied of such a nature that it must necessarily be included."

Gibson v. Chateau, 20 L. Ed. 536.

The foregoing sections 315 and 316, specially designate that the state and its grantees shall be bound by the statute, they are also included in section 1007 *ante*. The California court decided in People v. Center, 66 Cal., on p. 563-4, that section 315 ran against the state where there had been ten years adverse possession.

In the case of Stanley v. Schwolby, 40 L. Ed. 960, this court considered the statute of limitations of the state of Texas involved in that case, and determined for itself, the legal effect of such a *law* on the title therein involved as a federal question, although, the *facts* involved were to be determined by the state court. In the case at bar *all the facts involved are stipulated*, and only a question of *law* remained for the state courts and for this court. And a misconstruction of any state or local or general law violative of a federal right will be corrected by this court on writ of error, is also held in that case [P. 268.]

So this court in the later case of U. S. v. Chandler-Dunbar Water Power Co., decided April 20, 1908 (No. 599), October 1, 1907, reported in Advance Sheets of U. S. S. Court opinions issue

of May 15, 1908, V. 12, p. 579, holds that the statute of limitations runs against the United States by congressional enactment, and that the title, even in a void patent, would pass and vest in the designated person.

Also this court held in that case that by reason of the state law as to boundary lines, the state title passed, if it had any, to the private owner. And that the holding of the state courts to the contrary would be error.

So in the case at bar, on the stipulated facts, the state law has passed the legal title to plaintiff in error, as *sufficient against all*. The decision of the state court denies to that title the equal protection of the law, and takes it away without due process of law by condemnation and just compensation, and is thereby in error.

Review of the Case.

This being an action to quiet title the defendant in error as plaintiff below can only recover upon showing the *legal title* in it. Failing to so show, judgment must be for this plaintiff in error, whether it has the legal title or not.

The case by stipulation XXVII [Tr. fol. 59] is confined to the issues of the pleadings in this case and to be *determined* by the *stipulated facts*, without any further evidence by either party.

There is no stipulation of facts in this case that

the *legal title* was ever in the pueblo or in the defendant in error.

The stipulated grant [Tr. fol. 26] to the old pueblo, 1781, was an incohate or imperfect grant or permit of the same nature as the title to the pueblo lands. In this case the court in its decision [Tr. fol. 101] says "that pueblos had a right to the water appropriated to the use of the inhabitants *similar to that which it had in the pueblo lands.*" That is the *legal title* was in the government of Spain, and passed to the republic of Mexico, and by treaty to the United States, was denied to the city of Los Angeles by the proceedings, decrees and patent under the act of congress of March 3, 1851, and was never conveyed in any manner by the United States to defendant in error, but by stipulation of facts the *legal title* was conveyed by the proceedings and patent under said act of congress to this plaintiff in error, as shown by the stipulation of facts [Tr. fols. 52-3] and is now in this plaintiff in error.

The defendant in error has not and never had the *legal title* to the premises in controversy, which are situated some ten miles above the city on the river, and above any of its points of diversion of any waters of the river. [Tr. fol. 53.] (XV.)

The judgment of the state court is against the validity of the authority exercised by the United States in the premises, from whatever point

viewed, and should be reversed. As stated by this court in *Stanley v. Schwalby*, 40 L. Ed., p. 968:

"But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court whether that question depends upon the constitution, laws or treaties of the United States, or upon *the local law, or upon general principles of jurisprudence.*"

This judgment cannot be maintained unless the defendant in error, the city of Los Angeles, shows that the *legal* title was vested in it, as it alleges on its incorporation under the act of California of April 4, 1850. It alleges no other, and no other issue is raised in the case, or submitted for decision.

If the *legal* title passed by the treaty to the United States, the judgment must be reversed, as the city neither claims, nor do the stipulation of facts show, any conveyance from or through the United States.

If the claim of the city was presented and adjudicated under the act of congress, it was rejected, and is *res adjudicata*, and the judgment must be reversed.

If it was not presented under said act, then under section 13 of that act it reverted to the

public domain, and the judgment must be reversed.

If the word "land" as used in the act of 1851 and patents thereunder, includes the waters, in, on, and riparian thereto, as a part and parcel of the "land" itself, the judgment must be reversed.

If the claim of the city was not within the jurisdiction of that act of congress, then congress has not submitted it to the jurisdiction of any court, and the state court had no jurisdiction to consider it, and the judgment must be reversed.

If the patents were issued subject to the general common law of riparian rights adopted by the legislature of California, then each patent has equal riparian rights, and the judgment taking the riparian rights from one patent and transferring them to the other patent must be reversed.

The decision of this court in this case is of vital importance to more than a hundred thousand of the property owners in California, and will affect the value of millions of acres of land.

If the state court decision is correct, then every city holding confirmed pueblo lands in California (and they are all located on river streams) holds the *legal title* to all the waters in the stream, their branches and sources, from the surface of the ground down to bed rock, covering not only all upper riparian Mexican grant owners, but in-

cluding the riparian waters on the public domain on such streams. While it may be asserted that the state courts cannot bind the United States by its decisions, as to the public riparian domain, yet if this judgment is affirmed by the United States Supreme Court it would be conclusive, and all patents issued by the government for these public lands would be subject to such a decision as a precedent.

And when the patentees come into the state courts, as well as all who are on upper riparian Mexican grants, they would be met by the decision of the state courts, that the cases of Lux v. Haggin, Vernon Irr. Co. v. Los Angeles City, and Los Angeles City v. Pomeroy, *supra*, as well as this case were determinative of the rights of the cities to all of water in the upper riparian lands, from surface to bed rock, and that the riparian owners had no right to use "*any part thereof*," not even for domestic purposes. The lands without water are a desert. The water is the only element of value in this arid region.

The state Supreme Court in its decision [Tr. fol. 102] say:

"This question, however, ought to be considered *closed* by the previous decisions of this court in the Vernon Irrigation company case and others."

The doors of the courts of justice in California are thus announced to be closed against all riparian land owners where a city claims under asserted pueblo rights.

The Supreme Court of the United States alone holds the key and the power to open.

This court "*openeth and no man shutteth, and shutteth and no man openeth.*"

Respectfully submitted,

R. M. WIDNEY,

Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

LOS ANGELES FARMING AND MILLING
COMPANY,
Plaintiff in Error,

vs.

THE CITY OF LOS ANGELES,
Defendant in Error.

No. 137.

**SUPPLEMENTAL BRIEF FOR THE CITY
OF LOS ANGELES.**

The City of Los Angeles, defendant in error, submits this supplemental brief in amplification of the arguments in the brief already filed.

The question of the jurisdiction of this Court to review the decision of the State Court is, we submit, determined adversely to the plaintiff in error in the cases of *Crystal Springs Land and Water Co. vs. Los Angeles*, 177 U. S., 169; aff'd., 82 Fed. Rep., 114, s. c. 76 Fed. Rep., 148; *Hooker vs. Los Angeles*, 188 U. S., 314, s. c. 124 Cal., 597, and *Devine vs. Los Angeles*, 202 U. S., 313. The principal brief is largely devoted to the same question of jurisdiction.

In this brief we propose to submit to the court considerations affecting the merits of the controversy between the parties, but, in so doing, we do not depart from the argument advanced in the principal brief that the questions

involved in this case do not affect any federal right, but are purely matters of local law to be determined by the courts of the State. We confidently assert that a consideration of the merits of the controversy will confirm the contention of the defendant in error as to lack of jurisdiction, by showing that every question in the case depends merely upon local law, and that this case does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States upon the determination of which the result depends.

The facts appearing in the record are stated in the principal brief [pp. 4-17], and will not be here restated except so far as necessary to preserve the continuity of the argument.

FIRST POINT.

The stipulation of fact that the pueblo of Los Angeles, prior to and until the acquisition of California by the United States, had, under the laws of Spain and Mexico, the paramount right to the waters of the Los Angeles River, which is claimed by the City of Los Angeles herein, is decisive of the case.

The controversy between the parties has been simplified by the stipulation of fact (Tr., fol. 26, p. 10) that

"Under the Laws of the Kingdom of Spain, said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the complaint herein, to use all the water of the river, and such paramount right continued to exist under that government and under the Mexican government, until the acquisition of California by the United States."

This stipulation clearly imports that, if the acquisition of California by the United States had never taken place, and the present question had arisen in the courts of Mexico, under the laws of that country, the right of the City, as successor to the pueblo, to the paramount use of the waters, *as claimed in the complaint*, would not and could not have been questioned. Under this stipulation the plaintiff in error must assume the burden of establishing that the acquisition of California by the United States, or some Act of Congress or other statute, or changed interpretation of the laws of California has deprived the City of its paramount right. He has failed to satisfy the Courts of the State, and in this Court he can only claim that such deprivation or destruction has resulted in violation of some provision of the Constitution or laws or treaties of the United States. Plaintiff in error does not refer to any statute, either Federal or State, which purports to change the substantive rights of the City in the waters of the river, but apparently seeks to deduce a change in these rights by reason of the acquisition of California, or by the Acts of the United States in connection therewith, contrary to the principle that by the law of nations, pre-existing property rights are not affected or impaired by a change of dominion.

If, therefore, there is not only no statute or law of the United States which touches or affects the paramount right which is conceded to have existed at the time of the acquisition of California, but, on the contrary, the Acts of Congress and the decisions of the Federal Courts carefully preserve and continue the rights of the municipality, whatever they may have been, it will be demonstrated that the contention of the plaintiff in error has no substantial merit, and if in showing that fact it appears that the rights of the parties are governed solely by the principles of local law applicable to the State of California, it will also be demonstrated that this court is without jurisdiction as contended in the principal brief.

SECOND POINT.

The Letters Patent issued by the United States to the City of Los Angelos for pueblo lands, under the Act of Congress of March 3, 1851, were not a new grant to the City but only recognized and confirmed pre-existing rights under Spanish and Mexican law, which were vested in the City as successor of the pueblo.

Underlying the entire argument of the plaintiff in error as disclosed in its brief, there appears the idea that, upon the cession of California, the pueblo lands within the territory vested in the United States free from any equitable or property rights of the inhabitants of the pueblo, and thereby became a part of the public domain of the United States. Counsel for plaintiff in error apparently considers it vital to his case that he should succeed in establishing the proposition that the pueblo retained no title to its lands after the conquest; that such lands became a part of the public domain of the new sovereign; and that the patent issued to the City was, in fact, a new grant from the United States.

The erroneous nature of this argument is fully established by the decisions of this court, and of the courts of California as well as by the provisions of the Act of Congress of March 3, 1851. By that statute, the material parts of which are printed in an appendix hereto, it was provided in Section 14,

“That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for

the same shall be presented by the corporate authorities of the said town, or where the land on which the city, town or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and *the fact of the existence of the said city, town or village on the said seventh of July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village.*"

It was under this provision that the patent for the pueblo lands was issued to Los Angeles; and that patent is, as between the United States and the City, a complete adjudication that the City, being the same entity as the pueblo, had certain vested rights in the pueblo lands by virtue of a grant prior to the acquisition of California by the United States, which the United States, *in its political capacity*, elected to recognize and to continue, thereby preserving in the municipality, not only its property rights in the pueblo lands, but also its governmental control over the disposition and uses of the same as defined by the local laws. The United States did not undertake, even prior to the formation of the State of California, to destroy the existence of the municipalities in the acquired territory, or to deprive them of their property, whether held in a purely private capacity or for governmental purposes, nor did it attempt to strip the municipalities of their governmental powers; but in accordance with the law of nations, recognized the vested rights of these municipalities and by the statute in question declared that the rights of these municipalities to lands should be respected and given full effect.

The stipulation of facts in this case (Tr., pp. 10-25), contains the following significant admissions :

1. The foundation of the pueblo in 1781, embracing the same four square leagues subsequently patented to the city (fols. 24, 25).
2. The paramount right of the pueblo to all the waters of

the river under the laws of Spain and Mexico in the terms quoted above (fols. 25, 26).

3. The incorporation of the pueblo by the name of the City of Los Angeles by the statute of California of April 4, 1850, and the succession of the City "to all rights, claims and powers of the pueblo of Los Angeles in regard to property" (fols. 27, 28).

4. A petition under the Act of March 3, 1851 for confirmation of the *pueblo lands* (fols. 31, 32).

5. That after the acquisition of California by the United States, the pueblo of Los Angeles continued to exist and to be managed by the pueblo authorities (fols. 53, 54).

6. That both under the pueblo authorities and under the City authorities, the right to use the waters of the river has been asserted and exercised (fol. 54).

7. That the right of the pueblo, and of the city as successor, to the paramount use of the waters originated in 1781 (fols. 24, 25), whilst the predecessor in title of plaintiff in error did not acquire any kind of a riparian right until June 14, 1846 (fol. 51), sixty-five years after the pueblo had acquired its paramount right.

It is, therefore, in substance, stipulated as fact that there has been a continued *de jure* and *de facto* existence of a municipality comprising the same territory known under the Mexican law as the pueblo of Los Angeles, and under the Californian law as the City of Los Angeles, which city and pueblo were and are, in legal contemplation, one and the same municipality, notwithstanding the change of name, the change of sovereign, or change in the form of municipal administration.

It is a clearly recognized principle, well established by the decisions of this court, that although the legislature may have dissolved or abolished a municipal corporation, thereby in form terminating its existence, and by the same statute or other enactments has provided a new form of government for the same territory, whether by the same or by another name, such legislation will not affect the identity of the corporation, or its continued existence.

Broughton vs. Pensacola, 93 U. S., 266.

Mt. Pleasant vs. Beckwith, 100 U. S., 520.

Mobile vs. Watson, 116 U. S., 646.

Shapleigh vs. San Angelo, 167 U. S., 646.

This municipality existed and exercised the right claimed long before the riparian rights of plaintiff in error existed. It had them when the Mexican grant of the Rancho was made to the predecessor in title of the present plaintiff in error in 1846. Upon every principle of law and justice, it should have, and it now has them. *Qui prior est tempore, potior est jure.*

The Act of Congress of 1851 is a clear recognition by the United States that it was not contemplated that any act of the United States should change or affect the property rights of municipalities, but that they should continue unimpaired and unaffected by the acquisition of the territory.

And this has, we believe, been the unvarying course of decision of this Court. The cases cited by the plaintiff in error as an apparent exception to this doctrine, have been distinguished in our principal brief (pp. 107-109), and will be hereafter referred to further. They have, we believe, no application to this case.

This court has many times held that a patent of a Spanish or Mexican grant to an individual under the act of March 3, 1851, is only confirmatory of a right existing at the time of the cession of California, and that there is no distinction in this respect where the rights of pueblos are concerned.

In *Beard vs. Federy*, 3 Wall. (U. S.), 478, 491 (cited also in our main brief at p. 52), in defining the effect of a patent to Mexican lands issued under the Act of Congress of March 3, 1851, Mr. Justice FIELD said :

" In the first place, the patent is a deed of the United States. *As a deed its operation is that of a quit-claim*, or rather a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.

" In the second place, *the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country.* Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United

States thus succeeded was, of course, political in its character, and to be discharged in such manner, and on such terms, as they might judge expedient. By the act of March 3, 1851, they discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunal, and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. *By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described.*"

It will be noted in the above extract that this court uses the words that a patent under the Act of March 3, 1851, is in "its operation that of a quit-claim or rather a conveyance of such interest as the United States possessed in the land." We call attention to the fact that this language is substantially adopted by this court in its opinions delivered by Mr. Chief Justice FULLER in *Hooker vs. Los Angeles*, 188 U. S., 314, 317, and repeated by him in *Devine vs. Los Angeles*, 202 U. S., 313, 315.

In these cases he said :

"The patents were in the nature of quit-claims and under the act of March 3, 1851, were 'conclusive between the United States and the said claimants only and shall not affect the interests of third persons.'"

That is to say, the patent to the predecessors in title of the present plaintiff in error, the Farming and Milling Company, granted no new rights or new title, but only confirmed

such as were held under the laws of Spain and Mexico at the time of the cession of California to the United States, plus a quit-claim on the part of the United States of any possible right or title, which it may have had to the lands confirmed.

In the next case which came before this court, the opinion was again written by Mr. Justice FIELD, who, by reason of his residence in and service on the bench of California, and his unrivalled knowledge of the conditions and jurisprudence of the State, was, and still is, regarded as high authority on questions of Spanish and Mexican titles.

In *Townsend vs. Greeley*, 5 Wall. (U. S.), 326, 334, Mr. Justice FIELD said :

"The Treaty of Guadalupe Hidalgo does not purport to divest the pueblo existing at the site of the city of San Francisco of any rights of property or to alter the character of the interests it may have held in any lands under the former government. It provides for the protection of the rights of the inhabitants of the ceded territory to their property; and there is nothing in any of its clauses inducing the inference that any distinction was to be made with reference to the property claimed by towns under the Mexican government. The subsequent legislation of Congress does not favor any such supposition, for it has treated the claims of such towns as entitled to the same protection as the claims of individuals and has authorized their presentation to the Board of Commissioners for confirmation."

So, again, in *Newhall vs. Sanger*, 92 U. S., 761, a suit to determine the ownership of certain land in California, Mr. Justice DAVIS said :

"It may be said that the whole of California was part of our domain, as we acquired it by Treaty, and exercised dominion over it. The obvious answer to all inferences from this acknowledged fact, so far as they relate to this case, is that title to so much of the soil as was vested in individual proprietorship did not pass to the United States. It took the remaining lands subject to all the equitable rights of private property therein which existed at the time of the transfer. Claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected."

In *Palmer vs. Low*, 98 U. S., 1, in speaking of the effect of the Act of Congress of July 1, 1864, sec. 5 (13 Stat., 333), by which it is provided that "all the right and title of the United States to the lands within the corporate limits of the City of San Francisco as defined by the Act incorporating said City passed by the legislature of the State of California, on the 15th day of April, 1851, are hereby relinquished and granted to the said city and its successors for the use and purposes specified," etc., Mr. Chief Justice WAITE said :

"Whatever rights the city had under the Mexican title, it held for the use and benefit of the inhabitants; and the United States by the Act of 1864 relinquished and granted all their right and title for the same uses and purposes. *Clearly, therefore, the Act of Congress could not have been intended as the grant of a new right, but simply as the confirmation of the old one. The title of the City is the old imperfect title from Mexico confirmed by the authoritative recognition of Congress.*"

See also *San Francisco vs. Scott*, 111 U. S., 768, 769.

In *Brownsville vs. Cavazos*, 100 U. S., 138, 143, speaking of the effect of the treaty of Guadalupe Hidalgo upon the title to premises in Texas, Mr. Justice FIELD said :

"Rights of private property previously existing in the territory east of the Rio Grande were in no respect affected. If they had arisen before the independence of Texas, their validity was to be determined by the laws of Mexico or Tamaulipas then in force."

In *More vs. Steinbach*, 127 U. S., 70, a suit in equity to determine adverse claims to certain lands in California, the court considered the force and effect of the Act of Congress of March 3, 1851, "To ascertain and settle the private land claims in the State of California." Mr. Justice FIELD said (p. 78) :

"By the cession of California to the United States, the rights of the inhabitants to their property were not affected. They remained as before. Political

jurisdiction and sovereignty over the territory and public property alone passed to the United States.
United States v. Percheman, 7 Pet., 51, 87."

In *San Francisco vs. Le Roy*, 138 U. S., 656, the plaintiff sued to remove a cloud on title. It was conceded that the premises were, when the bill was filed, pueblo lands of San Francisco; *i. e.*, that they were part of the lands claimed by the city as successor of the Mexican pueblo of that name; that they were within the limits of the city of San Francisco as prescribed by the charter of 1851, and were within the four square leagues described in the decree of the United States Circuit Court for the District of California entered May 18, 1865, by which the claim of the city as such successor was confirmed and its boundaries established, and also within the lines of the patent of the United States for the pueblo lands, issued to the city in 1884. Speaking of the effect of a deed by the State Tideland Commissioners made in 1870, Mr. Justice FIELD said (pp. 670, 671):

"All the marsh lands, so called, which the State of California ever owned, were granted to her by the act of Congress of September 28, 1850, known as the Swamp-land Act, by which the swamp and overflowed lands within the limits of certain States, thereby rendered unfit for cultivation, were granted to the States to enable them to construct the necessary levees and drains to reclaim them. 9 Stat., C. 84 page 519. *The interest of the pueblo in the lands within its limits goes back to the acquisition of the country, and precedes the passage of that act of Congress.* And that act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect. As to tide-lands, although it may be stated as a general principle—and it was so held in *Weber v. Board of Harbor Com'rs*, 18 Wall., 57, 65,—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would

require their disposition in some other way. When the United States acquired California it was with the duty to protect all the rights and interests which were held by pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation (*Townsend v. Greeley*, 5 Wall., 326, 337). The duty of the government and its power in the exequition of its treaty obligations to protect the claims of all persons, natural and artificial, and of course of the city of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it the United States, through its tribunals, recognized the validity of that title at the date of treaty—at least, recognized the validity of the claim to the title as then existing, and in the execution of its treaty obligations no one could step in between the government of the United States and the city seeking their enforcement."

In *Knight vs. United States Land Assoc.*, 142 U. S., 162, where competing titles to certain lands in San Francisco were involved, one title being derived from the city as successor to the pueblo, and the other from the State as owner of the tide lands, Mr. Justice LAMAR, who delivered the opinion of the court, said (p. 183):

"For it is equally well settled that when the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo, 9 Stat., 922, they were bound, under the 8th article of that treaty, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty. *Tschemacher vs. Thompson*, 18 California, 11; *Beard v. Federy*, 3 Wall., 478. Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same. *Souillard v. United States*, 4 Pet., 511; *United States*

v. Perchman, 7 Pet., 51, 87; *Strother v. Lucas*, 12 Pet., 410, 436; *United States v. Repentigny*, 5 Wall., 211, 260."

He added (p. 184) :

" If we have succeeded in showing that the tract in dispute was part of the land claimed by the city of San Francisco as successor of the Mexican pueblo of that name ; that it is within the four square leagues described in the decree of the United States Circuit Court for the district of California, entered May 18, 1865 ; that that court decided and decreed that the claim of title was valid under the laws of Mexico ; that the official survey of the United States officers is correct and followed the decree of confirmation ; and that the patent of the government of the United States, following the survey and decree, embraced within its calls the property in dispute ; *we think it clearly follows that the patent of the government is evidence of the title of the city under Mexican laws*, and is conclusive, not only as against the government and against all parties claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court."

In the same case, Mr. Justice FIELD, who delivered a concurring opinion, in speaking of the effect of letters patent issued for a Mexican grant under the Act of Congress of March 3, 1851, said (142 U. S., 200) :

" The title under the patent necessarily antedated any possible claim of the State of California to the lands within the limits of the pueblo. It went back to the acquisition of the country from Mexico. When the United States acquired California, the inhabitants were entitled by the law of nations to protection from the new government in all rights of property then possessed by them. Jurisdiction and sovereignty passed from one nation to the other by the cession, but not private rights of property ; their ownership remained as under the former government. And by the term property, as applied to land, all titles are included, legal or equitable, perfect or imperfect."

Speaking of the effect of the treaty of Guadalupe Hidalgo, and the protection extended thereby to pre-existing rights of property, Mr. Justice FIELD further said in the same case, 142 U. S., 201,

"By the treaty of Guadalupe Hidalgo, the United States also stipulated for such protection, and that implied that rights of property, perfect or imperfect, held by the inhabitants previous to the acquisition of the country, should be secured to them, so far as such property was recognized by the laws and constitution of the new government; and for that purpose that the holders should receive from the new authorities such official and documentary evidence of their rights as would assure their full possession and enjoyment. **Pueblos in that respect stood in the same position as private individuals. All their rights of property, legal or equitable, were alike entitled to protection.**"

Cases Distinguished.

We submit that the foregoing authorities clearly show that it was the intention of the United States that the continuity of titles in California under the Mexican law should be strictly preserved, whether these titles pertained to individuals or to municipalities. But the plaintiff in error attempts to establish the contrary proposition and relies therein upon three decisions of this Court, namely :

- Grisar vs. McDowell*, 6 Wall. (U. S.), 363.
- United States vs. Santa Fe*, 165 U. S., 675.
- United States vs. Sandoval*, 167 U. S., 278.

Counsel quotes certain expressions in the opinions in these cases and attempts to establish therefrom that the City of Los Angeles, as successor to the pueblo, has only such title as is expressly granted by and originates in the patent issued to it. In other words, that the title of the City is not derived from the Mexican government, but is a new title conferred by grant from the United States.

Before examining these cases, we desire to point out that in each the question did not arise between two private in-

dividuals, but *as against the United States*. In other words, in each of these cases the question presented was whether, *as against the United States*, an individual or a municipality had such title to the lands as gave the right, either to possession, or to letters patent under the Act of 1891. In this case, the controversy is between two individuals, and no right is asserted by or on behalf of the United States.

In *Grisar vs. McDowell*, 6 Wall. (U. S.), 362, the action was to recover possession of lands in San Francisco. The plaintiff claimed as seized in fee under title from the City of San Francisco; the defendant claimed possession as an officer of the United States, setting up that the property was public property of the United States, reserved for military purposes. It was not claimed in the case on behalf of the plaintiff that any assignment of lands was ever made to the pueblo of San Francisco under the government of Mexico, and the court held that under these circumstances (p. 373) :

"Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one. It was a right which the government might refuse to recognize at all or might recognize in a qualified form; it might be burdened with conditions, and it might be restricted to less limits than the four square leagues, which was the usual quantity assigned."

By proclamation of the President of the United States made in November, 1850 (consequently prior to the Act of Congress of 1851), it was directed that certain lands which embraced the premises in controversy should be exempted from sale and reserved for public purposes (see pp. 366, 367). The city presented its claim under the Act of 1851 and the determination of the Board of Land Commissioners created by that act, was carried by appeal to the United States District Court, which appeal was later, pursuant to statute, transferred to the Circuit Court. That Court in May, 1865, confirmed the claim of the city to the four square leagues, excepting, among others, such parcels of land as had been previously "reserved or dedicated to

public purposes by the United States," meaning by this the tracts reserved, as above mentioned, by the then President, Mr. Fillmore (see, p. 368). Whilst an appeal by the United States to the Supreme Court was pending undetermined, Congress passed the Act of March 8, 1866, which relinquished and granted to the city and confirmed the claim of the city to, the lands specified in the decree, subject however, to the reservations and exceptions therein contained. The situation was therefore presented that the city, which in any event had only an incomplete and imperfect right at the time of acquisition, which the United States was not obliged to recognize, only acquired a qualified right subject to the exceptions and reservations mentioned, and the lands in controversy were included in these exceptions and reservations. The city, therefore, never perfected any right, either under the Mexican government, or by patent from the United States, to the lands in controversy. It was with reference to these excepted lands and to the right of the United States to the possession thereof, that the court said (pp. 380, 381) :

"It is enough that the title had not passed to the plaintiff, but remains in the United States,"

and further said in the closing sentence of the opinion (p. 382) :

"But it is sufficient, as we have already said, that the lands remained the property of the United States."

These are the expressions of opinion relied upon by the plaintiff in error, and quoted in its brief.

This court did not deny that the City of San Francisco, as successor to the pueblo, had some right or title under Mexican law to some part of the public lands, which right or title the United States was obliged to recognize and confirm. That this is so is shown by the following remarks of Mr. Justice FIELD (p. 372) :

"It must be conceded that the pueblo, which thus existed, possessed some claim, legal or equitable, to,

or some interest in, lands within the limits of four square leagues, to be assigned and measured off from the northern portion of the peninsula upon which the City of San Francisco is situated, and that the City has succeeded to such claim or interest."

Speaking of the Act of Congress of March 8, 1866, "to quiet the title to certain lands within the corporate limits of the City of San Francisco," the learned justice recognizes that this Act is intended to operate upon a claim or right which existed at the time of the cession and not to operate as a new grant. Thus he says (p. 378) :

" By this act the government has expressed its precise will *with respect to the claim* of the City of San Francisco to her lands, as it was then recognized by the Circuit Court of the United States. In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to ordinary tribunals. * * * The Act of March 3, 1851, is a general act applying to all cases, but the Act of March 8, 1866, referring specially to the confirmation of the claim to lands in San Francisco, withdrew that claim, as it then stood, from further consideration of the courts under the provisions of the general act. It disposed of the city claim, and determined the concessions upon which it should be recognized and confirmed."

It is apparent that marked differences exist in the present case. In the present case it is stipulated as a matter of fact (Tr., p. 10, fols. 24, 25).

" In that year 1871 the pueblo of Nuestra Senora Reina de los Angeles was established on the present Los Angeles River (then known as the Porciuncula) by the governmental action of the authorities of the Kingdom of Spain, which pueblo embracing four square leagues was included in, and is part of the present City of Los Angeles, the center thereof being the center of the plaza, and *such four square leagues*

embracing the lands afterwards patented to the Mayor and Common Council of the City of Los Angeles as hereinafter stated."

The identity of the lands patented with those granted to the pueblo in 1781, is thus conceded and established, and this fact of itself distinguishes the case from the rulings of this court in *Grisar vs. McDowell*, quoted above. In addition, letters patent have issued in this case without any exceptions or reservations for the entire pueblo lands.

We have discussed the case of *United States vs. Santa Fe*, 165 U. S., 675, in our principal brief (pp. 107-110), and have there shown many features which inherently distinguish that decision from the present. Other grounds of distinction appear to exist which we desire to present. In that case, the municipality and the lands were situated in the territory of New Mexico, territory over which, at the time of the controversy, as at present, the United States exercises the sovereign rights. The case came before this court by appeal taken by the United States from a decree of the Court of Private Land Claims, confirming to lot owners in privity with the City of Santa Fe the lots held by them in severalty in that city, and confirming to the city itself in trust for the use of its inhabitants a tract of four square leagues. The claim of the City was asserted under the Act of Congress of 1891, under which only "complete and perfect" claims could be recognized. As pointed out by this Court, it was settled in *Ainsa vs. United States*, 161 U. S., 208, 223, that :

"Under the Act of March 3, 1891, it must appear, in order to the confirmation of a grant by the court of private land claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could by right, and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States."

But no such imperfect right or claim has been shown to have existed in the present case. On the contrary, we sub-

mit that the complete and perfect identity of the four square leagues granted to the pueblo in 1781, with the lands patented to the city, is established by the stipulation (*id.*, fol. 25), and this element of uncertainty is entirely eliminated.

In any event, the act of March 3, 1851, only required an estate in land held by an individual or town, as the foundation for the issuance of letters patent. The right or title did not require to be perfect and complete. Thus, in *Townsend vs. Greeley*, 5 Wall. (U. S.), 326, 335, Mr. Justice FIELD said :

"Nor is there anything in the Act of March 3, 1851, which changes the nature of estates in land held by individuals or towns. One of the objects of that act was to enable claimants of land, individual or municipal, by virtue of any right or title derived from Spain or Mexico to obtain a recognition of their claims; and, when these were of an imperfect character, to furnish a mode of perfecting them. * * * By proceedings under that Act, imperfect rights—mere equitable claims—might be converted by the decrees of the board or courts, and the patent of the government following, into legal titles."

In *Hayes vs. United States*, 170 U. S., 637, an appeal from the Court of Private Land Claims, the application for a patent was made under the Act of 1891, and in the opinion of the court, Mr. Justice WHITE (pp. 647, 648) expressly stated that the Act of 1891 differed in its provisions and effect from the Act of March 3, 1851.

The earlier decisions of this court in reference to Mexican and Spanish titles, which were considered by the court in *Santa Fe* case as not determinative of the question involved in the latter case, were rendered with reference to the Act of March 3, 1851, which, unlike the Act of March 3, 1891, did not require the claimant to show a "complete and perfect title" in order to justify the issuance of the patent by the United States.

Moreover, the earlier cases in this court follow and apply the rules which have been adopted by the courts of California.

See,

Hart vs. Burnett, 15 Cal., 530.

Fulton vs. Hanlow, 20 Cal., 480.

They form the foundation for the titles to lands, private and pueblo, in California patented under the Act of 1851, and we do not understand that it was the intention of this court in construing the Act of 1891 in the *Santa Fe* case to alter the settled rules of property in California.

In *Leese vs. Clark*, 20 Cal., 387, 423, Mr. Justice FIELD, who delivered the opinion in many of the earlier cases in this court, said, with reference to a patent issued under the Act of March 3, 1851,

" By it [the patent in confirmation] the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the laws of Mexico and the stipulations of the Treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described."

Other cases in California embodying similar views are referred to in our principal brief (pp. 100-106).

The case of *United States vs. Sandoval*, 167 U. S., 278, was also an appeal from the court of private land claims from a decree or decision made by it under the Act of 1891, and in that case there was the same imperfect and incomplete right which excluded the claim from the jurisdiction of the court of private land claims.

In *Grisar vs. McDowell*, *supra*, there was no determination in the patent that the claim was valid, because of exceptions and reservations contained in the letters patent, as already pointed out. In *United States vs. Santa Fe*, *supra*, and in *United States vs. Sandoval*, *supra*, there was no determination that the claim was valid, because the questions before the court arose on an application for a patent, and the court decided that a patent should not issue. In the present case there was such a determination, a patent being issued under the Act of 1851 to the City of Los Angeles.

In the present case there is no element of uncertainty or incompleteness, either in the right of the pueblo to its

pueblo lands or to the paramount right to the use of the waters. The stipulation of fact already referred to concedes the completeness and perfectness of the right of the pueblo of Los Angeles to both the pueblo lands and to the paramount use of the water prior to and at the time of the acquisition of California. Upon this record, therefore, every feature which might justify or require a grant of letters patent from the United States existed, and the letters patent were issued without any exception or reservation. And the Attorney General of the United States notified the board of land commissioners that the appeal of the United States would "not be prosecuted" (Tr., p. 19, fol. 46).

Even if we were to concede, which we do not, an imperfection or incompleteness in the right of the city to the pueblo lands, or to the use of the water, it is difficult to see how any such incompleteness can benefit the plaintiff in error in the present case. That incompleteness might have formerly been a ground for refusing to issue letters patent to the city, but the United States, through its duly constituted authorities, did not so regard it, and waived the imperfections, if any existed. Even if there were imperfections, they only existed in favor of the government, and not in favor of upper riparian proprietors. The plaintiff in error has stipulated that so far as he is concerned there was no such imperfection in the paramount right to the use of the waters. As against the upper riparian proprietors, including the plaintiff in error, the rights of the pueblo at the time of the cession were perfect and complete, and if the United States elected to waive any imperfections or incompleteness in those rights as against it, and to issue letters patent thereon, as it did, thereby perfecting the claim and right of the city as successor to the pueblo, as against the government, that waiver enures to the benefit of the city, but cannot benefit the upper riparian proprietors.

THIRD POINT.

It is the established law of California, founded upon the Mexican law, that municipalities, which are the successors of Mexican pueblos and are located upon innavigable streams, have a paramount right to the use of waters of these streams for the benefit of the inhabitants.

The courts of California have many times considered the title of Mexican pueblos to the paramount right to use the waters of innavigable streams upon which they may be situated for the benefit of the inhabitants of the pueblos. They have invariably sustained this right, and in so doing, have interpreted, not a statute, constitution or treaty of the United States, but the local laws of the country as derived from Spain and Mexico and as applied to the special conditions of the locality.

A claim that there has been an error in the interpretation of the local law seems to be the only theory upon which the plaintiff in error can advance a grievance. Its grievance, if any, is one for the determination of the courts of the State; and having been determined there, any further application for redress must be made to the Legislature of the State, and cannot be obtained in the Federal courts.

An examination of these decisions will also show, we believe, that the right of the pueblo to the paramount use of the water attaches by law as an incident of the grant of the right to form a pueblo, or of a grant of pueblo lands. Such paramount right, in other words, is a legal right, attaching for the public good to pueblos upon their creation by grant, and does not, and never has, depended for its existence upon a specific grant of the right itself. Such at least appears to be the view of the courts of California, whose decisions on this matter are controlling.

The whole question was very fully and carefully considered in the case of *Lux vs. Haggan*, 69 Cal., 255. In

that case, MCKINSTRY, J., began his discussion as to the rights of riparian owners and of pueblos, by the following general statement declaring that these rights are matters of local law (p. 313) :

" It may be conceded that if riparian owners have any right in waters (or in the lands themselves) it is such as is created by the law of the land. It is at least equally true, however, that every inhabitant of a State or district does not possess a potential right, inherent in his habitancy, to divert so much of the waters of a stream as he may have occasion to employ. *The whole matter depends upon the law of the country.*"

Before discussing the rights of pueblos to the use of the waters of the navigable streams upon which they are situated, he points out that the Mexican law permitted grants of exclusive use to individuals, saying (p. 317) :

" The common use of the waters, it would seem, existed only while they continued to flow in and constitute a portion of the river. *But under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals.*"

He proceeds [p. 321] :

" The power of determining whether the public good—the purposes for which the social state exists—demands the use of the whole or portions of the waters should pass as an exclusive right to one or a class of individuals, remained in the sovereign. Whether the power is an incident to the ultimate domain or right of disposing of the property of the State, or is to be referred to some other source or principle, the Mexican government employed the power of permitting the diversion of waters from in-navigable rivers by those not riparian proprietors, upon such terms and conditions, and with such limitations, as were established by law, or by usages and customs which had the force of law. That government saw fit to concede private rights to the exclusive use of the waters of such streams. *It had power to do this, even if the consequence should be the entire deprivation of the common use.*"

After referring to *Hart vs. Burnett*, 15 Cal., 530 (which held that a pueblo had a "certain right or title" to the lands within its limits), and to the nature of the right so recognized, he says (pp. 328, 329) :

" By analogy and in conformity with the principles of that decision, we hold the pueblos had a species of property in the flowing waters within their limits, or a 'certain right or title' in their use, in trust to be distributed to the common lands, and to the lands originally set apart to the settlers, or subsequently granted by the municipal authorities. It may be conceded that such authorities were not authorized to make concessions to individuals of the perpetual and exclusive use of portions of the waters, without reference to the needs of the other inhabitants ; or that such concessions would be an abuse of the trust. But they had a species of right or title in the waters, and their use, subject to the public trust of continuously distributing the use in just proportion. The trust is within the supervision and control of the State. Thus, the legislature has provided for the mode and manner in which shall be exercised the trust of distributing the waters by the city, the successor of the pueblo of Los Angeles. The inhabitants of the former pueblo who were using water when this territory was transferred to the United States had not acquired a vested right to any particular quantity of water. And the occupants of lands within the city, the pueblo's successor, are beneficiaries only to the extent that they are entitled to the use of such water and at such times as accords with the laws regulating the public and municipal trust."

He further adds the remarks quoted on page 78 in our principal brief as follows (69 Cal., 329) :

" Every pueblo was *quasi* a public corporation. By the scheme of the Mexican law it was treated as an entity, or person, *having a right as such, and by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated*, while as a political body, it was vested with power, by ordinance to provide for a distribution of the waters for those for whose benefit the right and power were conferred."

In *Vernon Irrig. Co. vs. Los Angeles*, 106 Cal., 237, these views were approved and followed, and *Temple, Com'r*, whose opinion was adopted by the court in bank, said,

"The waters of all rivers were, under the Spanish and Mexican rule, public property, to be administered and distributed for the use of the inhabitants. Apparently this was sometimes done by the pueblo authorities outside of the pueblo lands. It must be remembered that *towns and villages were greatly favored under the Mexican system*; that to establish them was the mode adopted for the settlement of the country. Contractors (*capitulantes*) were rewarded for organizing them. The ordinances of the king of Spain and the provisions of the government of Mexico in regard to them direct that they be located where water will be convenient. The organization of the pueblo of Los Angeles itself—to be hereafter referred to—will show the solicitude of the government in regard to this matter. Since the water belonged to the nation, and could not be acquired from it by condemnation, it would seem to follow as a matter of necessity that, when the pueblo was organized under the laws, a sufficiency of this water for the pueblo was appropriated to it. The country was arid. The population was at first almost wholly agricultural, and we have seen the waters were held by the pueblo, subject to the duty of distributing the same in the public interest. *Nor do I think this was a mere political power, which could be revoked at any time, so as to deprive the settlers who had been induced to become inhabitants of the pueblo of it.* They had the same kind of right with reference to it which they had to the lands. Both were held as communal property, for the benefit of the inhabitants, and as an inducement to attract settlers."

After referring to *Lux vs. Haggin*, and discussing the history of the foundation of the pueblo of Los Angeles, he proceeds:

"Counsel have furnished me with translations of numerous ordinances, laws, rules and regulations of Spain and Mexico, relating to this subject. After perusing them, I am satisfied with the conclusion reached in *Lux v. Haggin* that *pueblos had a right to the water which had been appropriated to the use of the*

inhabitants, similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water for its inhabitants and for municipal purposes is superior to the rights of plaintiff as a riparian owner."

The same principles were recognized in *Los Angeles vs. Pomeroy*, 124 Cal., 597 (a case in which a writ of error was dismissed in this court *sub. nom. Hooker vs. Los Angeles*, 188 U. S., 314). The opinion of Mr. Chief Justice BEATTY recognized the paramount right of the city and to that extent was adopted by the remainder of the court. The other members of the court, however, dissented from his conclusion that the extent of the paramount right of the city, and held that the right pertained to the municipality as an entity, and might be exercised within the limits of the municipality as fixed by law at the time of the use.

In the present case (reported below, 152 Cal., 645), the same doctrine is again declared.

In *Fellows vs. Los Angeles*, 151 Cal., 52, SHAW, J., discussed the same question, and after referring to the opinion of Mr. Justice TEMPLE in *Vernon Irrig. Co. vs. Los Angeles, supra*, he says,

"Concerning the river, he [TEMPLE, J.] proceeds to say in contra-distinction [that is, in contra-distinction to communal lands], 'Now the waters of all rivers were, under the Spanish and Mexican rule, public property to be administered and distributed for the use of the inhabitants,' and in the succeeding part of the opinion it is shown that the pueblo of Los Angeles was located near the river and *its waters dedicated to the public use for the inhabitants of that pueblo*. Of this the court takes judicial notice."

The same principles have been recently affirmed by the Supreme Court of California in its opinion in the cases of *City of Los Angeles vs. Hunter, et al.*, and *City of Los Angeles vs. Buffington, et al.*, decided together December 1, 1909, and reported in 105 Pac. Rep., 755. These cases, like the present, involved the paramount right of the city to the use of the waters and the claim of the city was in all things sustained. Mr. Justice HENSHAW, who delivered the

opinion of the court, which was concurred in by SHAW, ANGELLOTTI, MELVIN, SLOSS and LORIGAN, JJ., without any dissent, said in disposing of the issues :

" If, as here contended and found, the city of Los Angeles has paramount right to the use of all the waters of the river, then, under the doctrine thus enunciated, none of these so-called percolating waters may be withdrawn to the invasion and injury of such right " (See *Hudson vs. Doiley*, 105 Pac. Rep., 748 [L. A. No. 2234], filed Dec. 1, 1909).

" To this proposition we now come. The decisions of this court in *Lux v. Haggin*, 69 Cal., 255; *Vernon Irrigation Co. v. City of Los Angeles*, 106 Cal., 237; *City of Los Angeles v. Pomeroy*, 124 Cal., 597; *City of Los Angeles v. Los Angeles Farming & Milling Co.*, 152 Cal., 645, taken with the cases of *Hooker v. City of Los Angeles*, 188 U. S., 314, and *Devine v. City of Los Angeles*, 202 U. S., 313, must be regarded as a definite determination of the city's right. Collectively, these cases present the same arguments as are here advanced by appellants, and the decisions denying validity to these arguments must be considered as closing the contention. The right to use the water upon annexed territory not within the limits of the original pueblo is distinctly declared in *City of Los Angeles v. Pomeroy, supra*.

The question of the extent to which the city is entitled to exercise its paramount right, and whether the right is confined to the limits of the pueblo as originally created or extends to the entire city, is purely one of local law, and has been so regarded by the courts of California. The courts of California are the tribunals best qualified to pass upon the peculiar conditions and requirements of the country, and to determine how far the rules which are elsewhere received should be qualified to suit the exigencies of the situation. It is not an extravagant claim to assert that the interests of a rapidly growing and populous city which now has 300,000 inhabitants, should not be subordinated to the purely agricultural interests of the adjacent territory in a matter so important to the municipality as an adequate supply of water. In any event, the question seems to be one which depends upon actual conditions rather than upon a theory, and the Supreme Court of California, in the

case last cited, has pointed out that the needs of the City within the limits of the pueblo as originally created are sufficient in themselves to require the use of all the waters of the river. On this point, Mr. Justice HENSHAW says, in the case last cited :

"Moreover, with the extraordinary growth of the city of Los Angeles within the original pueblo limits of four square leagues, this question becomes of no practical importance, since it is fairly well established that *all of the supply of the Los Angeles river is required for legitimate uses within the limits of the old pueblo.*"

These decisions of the Supreme Court of California contain the rulings of that court upon the merits of the plaintiff in error's claim, and a careful examination of the opinions will disclose the fact that, in order to determine the questions before it, the court of the state did not refer to the Constitution of the United States or to any act of Congress, or to any treaty, for the purpose of ascertaining the rights of the parties. The questions under consideration were treated and determined purely as matter of local law without reference to any Federal question; and as rulings on matters of local law, the decisions of the courts of California are final and conclusive.

These decisions further show that the paramount right of the pueblo to the use of the waters attached either by reason of the existence of the pueblo as such, or by reason of, and as an incident to its title to the pueblo lands. The right was in the nature of a dedication effected by operation of law, and was founded upon the rules of law relating to pueblos, and not necessarily upon any specific grant of the right. The paramount right of the pueblo was in all respects similar and analogous to the right of a riparian owner to use the waters of the stream in connection with his lands, and like these riparian rights existed by operation of law. In its nature and origin, it is similar to the riparian rights which the plaintiff in error in the present case claims are, or will be, invaded by the exercise of the paramount right of the city, and no distinction can be made in the canons of construction or the application of the principles of law, in

dealing with the paramount right of the pueblo, and of the city as its successor, and with the riparian right of the plaintiff in error. In other words, if the riparian right of the plaintiff in error attached by reason of a grant bounding upon the river and confirmed by letters patent of the United States, so in the same manner, the paramount right of the city as successor to the pueblo attached by the creation of the pueblo and the confirmation to the city of the pueblo lands without any specific mention of the paramount right in the letters patent.

FOURTH POINT.

The Statute of California declaring that the Common Law should be the law of the land did not affect the paramount right of the city to the use of the waters.

The application and effect of this statutory provision was fully considered by the Supreme Court of California in *Katz vs. Walkinshaw*, 141 Cal., 116, 124, and the conclusion was reached that, notwithstanding the provisions of the statute, such parts of the common law of England as are not adapted to the conditions of California form no part of the law of the State. The reasoning of the court is set forth at length, and is supported by a wealth of citation and authority ; and it is to be observed that, in applying this doctrine, the court cites the cases of *Harris vs. Harrison*, 93 Cal., 676, and *Wiggins vs. Muscupiabe Co.*, 113 Cal., 182, as holding that the common law respecting riparian rights had been modified in California to suit the peculiar conditions there. A reference to these cases shows that it was upon a modification of the common law that the right of riparian owners to appropriate waters for purposes of irrigation was sustained, and that upon such modification, also, the court declared that an apportionment might be made in equity by the courts.

When, therefore, the plaintiff in error in this case argues that the statute declaring the common law to be the law of the land destroyed the paramount right of the pueblo and of the city as the successor of the pueblo, to the use of the waters of the river, he adopts an inconsistent position, for it is only because the common law does not apply that he has the right to appropriate the waters for purposes of irrigation. The foundation of his supposed grievance is that this right of irrigation is taken away from him through the exercise of the paramount right of the city, and it should seem to be sufficient answer to that contention to say that the same local law which gave him the right to irrigate qualified that right by subjecting it to the paramount right of the pueblo to use the waters for its inhabitants.

FIFTH POINT.

The riparian rights of patentees from the United States are to be determined according of the law of the State in which the lands lie.

This is clearly established in the recent decision of *Whitaker vs. McBride*, 197 U. S., 510, 511, where the question involved the title to an unsurveyed island in the bed of a stream. Mr. Justice BREWER said :

"It is the settled rule that the question of the title of a riparian owner is one of local law. In *Hardin v. Jordan*, 140 U. S., 371, the matter was discussed at some length, the authorities cited, and the conclusion thus stated by Mr. Justice BRADLEY, delivering the opinion of the court (p. 384) : 'In our judgment, the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.'"

He cites in support of this doctrine the following cases:

- Shively vs. Boalby*, 152 U. S., 1, 45.
- Lowndes vs. Huntington*, 153 U. S., 1, 19.
- Grand Rapids, etc., R. Co. vs. Butler*, 159 U. S., 87, 92.
- St. Anthony Falls Power Co. vs. Water Commissioners*, 168 U. S., 349.
- Keene vs. Calumet Canal Co.*, 190 U. S., 452.
- Hardin vs. Shedd*, 190 U. S., 508.

Other illustrations of the application of the rule that the nature and extent of riparian rights is purely a matter of local law, and that they will be determined thereby, although the title to the riparian lands is founded upon a grant or patent from the United States, will be found in the cases of

- St. Louis vs. Myers*, 113 U. S., 566.
- Packer vs. Bird*, 137 U. S., 661.
- Eldridge vs. Trezevant*, 160 U. S., 452.
- St. Louis vs. Rutz*, 138 U. S., 226.
- Illinois Cent. R. Co. vs. Illinois*, 146 U. S., 387, 435-437, 465-474.

In *Lowndes vs. Huntington*, 153 U. S., 1, 19, Mr. Justice BREWER said :

"The question is of the rights attaching to certain lands within the territorial limits of the State, and whatever becomes a settled rule of real property by the decisions of its courts, is conclusive on this court."

When, therefore, patents were issued to the city of Los Angeles and to the predecessor in title of the plaintiff in error, the riparian rights of the respective parties were to be determined by the local law of California. The only source from which this local law can be deduced is the decisions of the courts of the State to which reference has already been made. These decisions show that, as construed by the courts, waters of the State are subject to appropriation, that by the laws of Mexico pueblos were favored, that to induce their settlement they were given a paramount right to the use of all the waters of the rivers upon which they bounded, or near which they were situated, and that the rights of upper riparian owners were subject to be limited,

or possibly annihilated, by the paramount right of the pueblos.

Upon settled principles of construction, therefore, it was not necessary for the City of Los Angeles to present any claim to a paramount right to the use of the waters to the commissioners under the Act of March 3, 1851, because the right inhered in the pueblo by virtue of the local law and by reason of its proximity to the river. It was a purely legal right founded upon the recognition of a legal principle, and it was no part of the duty of the commissioners to pass upon the principles of the local law which applied to the grant.

Furthermore, by the creation of the State of California, and its admission into the Union, the sovereign power of enacting and declaring the local law was vested in that State, and on March 3, 1851, it was not within the power of Congress to confer upon any special tribunal appointed by it the power of declaring general principles of local law which should apply to lands within its borders.

For precisely the same reason, it was not necessary to incorporate any exceptions or reservations in the patent issued to the predecessor in title of the plaintiff-in-error. The patentee took his patent subject to the rules of the local law, defining the nature, character and quality of his riparian rights; and when that law limited these rights by subjecting them to the paramount right of the pueblo, or of the city as its successor, to use the waters of the river, the qualification inhered in and attached to the riparian rights of the patentee and followed them, subjecting them to precisely the same limitations and qualifications after the acquisition of California that they had been subject to prior thereto.

The contention of the plaintiff in error that because he obtained a patent from the United States confirming to him lands bounding on the Los Angeles River, these lands were freed or released from any limitation or qualification of riparian rights growing out of the paramount right of the City of Los Angeles to use the water, has, in substance, already been decided adversely to him by this Court in a case in which an analogous claim was advanced on behalf of the patentee of lands on the Mississippi River.

In *Eldridge vs. Trezevant*, 160 U. S., 452, the contention

of the then plaintiff in error is thus stated by Mr. Justice SHIRAS (p. 466) :

"The first contention of the plaintiff in error is that, as it is admitted that he owns the land in fee through title derived by patent from the United States, without reservation, whatever may have been the conditions of the ancient grants, no such condition attaches to his ownership, and the lands although bordering on a navigable stream are as much within the protection of the constitutional principles awarding compensation as other property. In other words, the claim is that the servitude under which are held lands whose titles are derived by grant from Spain or France or from the State does not attach to lands whose titles are derived from the United States."

This court overruled this contention and held that the lands so granted by letters patent of the United States were subject, under the local law *derived from France*, to an easement or servitude permitting the State, in the exercise of its police power, to construct a levee on his land to protect the country from overflow.

We submit to the Court, that every question in this case is to be determined upon principles of local law, and that even if the merits be considered, it is apparent that there is no foundation for the claim that this court has power to review the decision of the state court.

SIXTH POINT.

We respectfully submit that the writ of error should be dismissed, or the decree of the Supreme Court of California in this case should be affirmed.

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APPENDIX.

(9 U. S. STATUTES AT LARGE, p. 631.)

CHAP. XLI.—*An Act to ascertain and settle the private Land Claims in the State of California.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. [Commission constituted.]

SEC. 2. [Secretary, duties.]

SEC. 3. [Clerks.]

SEC. 4. [Agent for United States; duties.]

SEC. 5. [Sessions of Commissioners.]

SEC. 6. [Oaths; testimony.]

SEC. 7. [Subpoenas.]

SEC. 8. And be it further enacted, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. And be it further enacted, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and

to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of Commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. And be it further enacted, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable

to give such security, the appeal may be allowed without security.

SEC. 11. And be it further enacted, That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. And be it further enacted, That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. And be it further enacted, That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the

public lands for the State of Louisiana", approved third March, one thousand eight hundred and thirty-one: Provided, always, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. And provided, further, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. And be it further enacted, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits

of the same may be made by the corporate authority of the said city, town, or village.

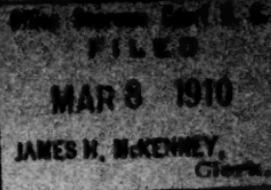
SEC. 15. And be it further enacted, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. And be it further enacted, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. [Compensation of Commissioners, etc.]

SEC. 18. [Secretary to receive no fees, etc.]

Approved, March 3, 1851.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 137.

LOS ANGELES FARMING AND MILLING CO.,
A CORPORATION, PLAINTIFF IN ERROR,

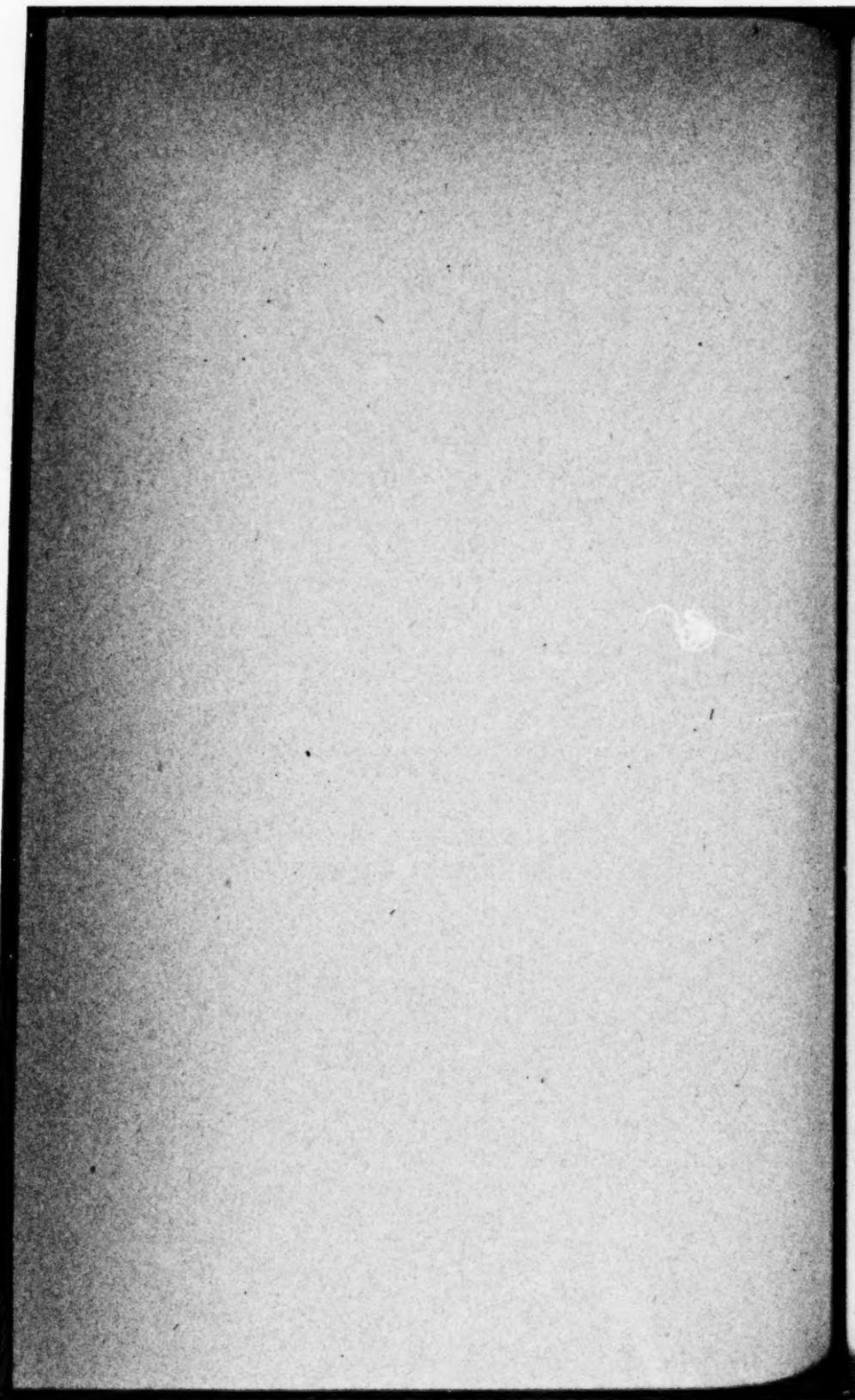
vs.

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORA-
TION, DEFENDANT IN ERROR.

REPLY TO SUPPLEMENTAL BRIEF FOR THE
CITY OF LOS ANGELES, FILED MARCH 7, 1910.

R. M. WIDNEY,
Counsel for Plaintiff in Error.

(21,127.)



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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LOS ANGELES FARMING AND MILLING CO.,
A CORPORATION, PLAINTIFF IN ERROR,

v.

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,
DEFENDANT IN ERROR.

**REPLY TO SUPPLEMENTAL BRIEF FOR THE
CITY OF LOS ANGELES, FILED HEREIN MARCH
7, 1910.**

May it please the court:

Counsel for defendant in error deeming it advisable to amplify the arguments they had already advanced, filed on March 7, 1910, an additional brief to which we reply.

I.

Counsel devote their argument to support two general points:

1st. That under the treaty all property rights were preserved to Mexican grantees and assert that we claim that the treaty transferred such property rights to the United States.

We have asserted no such proposition. We assert and have continuously asserted that the treaty preserved as to property the *status quo* existing under the former government for which the treaty substituted the United States Government.

That *status quo* was this, the pueblo and our Mexican grantees held unfinished executory contracts (called grants) for unsegregated portions of the public domain of Mexico, which, under the former government, they could ask that government to complete.

In all these cases of unsegregated grants the *legal title* remained in the sovereign, subject to the executory grant. That was the property right protected by the treaty.

The treaty made no change, but left the *legal title, the fee, in the former sovereign*, and passed it to the United States.

Not one case cited by counsel in any brief shows that this court ever decided in a single California case of these executory unfinished, inchoate, unsegregated pueblo or other grants that the *legal title* was not in the sovereign and remained there until final determination by the sovereign and issue of the United States patent.

But in every such case, without shadow of variation or exception, this court has always decided in every case in this court that the *fee, the legal title*, was transferred by the treaty to the United States and remained there until the United States patent issued, and it alone, for the first time, passed the *legal title* to the patentee.

Counsel for the city (page 92 of their first brief), speaking of the city, say: "Its title to the lands and its rights to the waters of the Los Angeles river were derived from the Republic of Mexico and not from the United States."

The city claims no *legal title* from the United States, and the stipulation of facts show no *legal title* from the United States to the city.

Therefore the city never had the *legal title, the fee*, under the former sovereign, and never acquired it from the United States.

The *legal title* alone is the subject of this litigation, in an action to quiet title. No inchoate rights or questions are involved.

Fudicker *vs.* East Riverside Irr. Dist., 109 Cal., 38-39.
Gibson *vs.* Chateau, 22 L. Ed., p. 537.

In this action the city alleges in its complaint that it owned the *legal title* at the date of its organization under the constitution and laws of the State of California. And the date of such organization was April 4, 1850, as stipulated (Tr., p. 11). At that date the *legal title* was in the United States and not in the city. The city patent, issued in 1866, does not include the premises in controversy (Stip. T., p. 24), and this patent recited the rejection of all claims of the city outside of four square leagues.

All of counsels' citation of authorities to show that inchoate, executory grants, and property rights continued to exist after the treaty the same as before until adjudicated by the new sovereign we never disputed.

But all of the decisions of this court, without exception, decide that at the same time the *legal title, the fee, was never in the pueblo*, but remained in the former sovereign and passed by treaty to the United States.

This is fatal to the city's claim in this action that on April 4, 1850, it owned the *legal title*, and it claims no other date of acquiring the title. It cannot herein claim any other, for they have stipulated (Tr., page 25, XXVII) "that the case made on the complaint and answer shall be submitted and decided on the foregoing stipulation of facts without any further evidence by either party, and said stipulation is hereby made irrevocable."

The various cities in California always claimed more than they had even equitable rights for, as the city of Los Angeles claimed sixteen square leagues and all the waters of the watershed of the Los Angeles River.

But the United States, and not the city of Los Angeles,

had the right and power to determine the extent of the rights as they actually existed at the date of the treaty. And the patent was a final adjudication by the United States that the original equitable rights of the party under the former government and existing at the date of the treaty are as stated in the patent, and that all other claims, more or less extravagant, or not presented, were invalid and were rejected as having no existence at the date of the treaty.

Hence we stipulated the existence of some kind of a grant under the laws of Spain as existing *until* the acquisition of California by the United States. We could not stipulate further, for the United States could alone decide what it would do with pueblo titles.

The act of Congress of March 3, 1851, and decree of the Federal tribunals thereunder and patent rejecting all claims of the city outside of four square leagues are conclusive against all claims of the city to anything outside of its patent limits.

The city therefore *never has had* the legal title to quiet in this action, and the judgment should be reversed.

The United States Government never issued a patent or other conveyance to the city of Los Angeles for the Los Angeles river and its waters from the south boundary of the city to the sources of the river on the public lands from the surface of the ground down to bed rock, as claimed in the city's complaint and adjudged by decree of the California courts. Neither did it pass as appurtenant to the city's patent for four square leagues.

Land can not pass as appurtenant to land.

Jones *vs.* Johnston. 15 L. Ed., 320.

The above is our reply to the *first* and *second* points in said supplemental brief of the city.

Second.

The third, fourth, and fifth points in said brief (pp. 22, 29, 30), as we understand them, are all based upon the statement of the Supreme Court of the State of California, appearing (Tr., p. 43) to wit: The only question in the case, therefore, is whether under the general law of the *locality* the old pueblo of Los Angeles, and the respondent herein have, as against appellants the prior right," &c.

All through counsel's first brief runs the same claim about *general law of the locality*. On page 58, their first brief, they say:

"The State court decided that, under the general law of the locality, the city had the paramount right," &c. Also on page 31 of the supplemental brief counsel say: "The *only source* from which this *local law can be deduced* is the decisions of the courts of the State to which reference has already been made." The statement "general law of the *locality* runs all through their first brief, and from page 22 on through their supplemental brief. And on this they seek to avoid the Federal laws, decrees, and patents by trying to place their judgment on some local State law applicable to this case and the city of Los Angeles.

It is useless to disguise the fact, but it is clear in this case that the State court did all in its power to accomplish such result.

OUR REPLY.

There is no such law in the published statutes of the State of California except the void statutes of the State directly trying to grant and convey such right to the city. They are admitted to be void.

Any other purported law created by the decisions of the California court are excluded by Stipulation XXIII (Tr., p. 24), to wit:

"It is further stipulated that any court in which this action may be pending, shall take judicial notice of all statutes, private as well as public, of California, from the first session of 1850 to the present time, and including all charters and amendments to charters, approved under the Constitution of 1879, both as originally adopted and as subsequently amended from time to time, so far as the same relate to or affect the plaintiff, or any municipal corporation of which it is the successor, or the said Los Angeles river or the waters thereof, *as set forth in the published statutes of the State of California*, the same as if fully set out herein," &c.

Everything else is excluded by Stipulation XXVII (Tr., p. 25), to wit:

"It is further stipulated that, in consideration of the disclaimer by the plaintiff of any interest in the lands described in the amended cross-complaint herein, *the case made on the complaint and answer herein, shall be submitted and decided on the foregoing stipulation of facts, without any further evidence on the part of either party, and such stipulation of facts is hereby made irrevocable.*"

The general *law of the locality* of Los Angeles city does not exist in the *published statutes* of the State of California and are barred from this case. They do not exist. The legislature never passed such a law, and the courts could not make such a law out of their decisions nor out of the Mexican law nor any other.

If today the legislature were to enact the decision of the State court into a statute, it would be void under the act of Congress admitting California as a State so far as it attempted to convey any of the patented premises of this plaintiff in error to the city of Los Angeles. The general *law of the locality* of Los Angeles is a myth and a judicial fiction and void on its face. For the following reasons:

Article III, section 1, of the State Constitution vest the State powers in the legislative, judicial and executive de-

partments, and prohibits either one from assuming any functions of the other.

Article IV, section 1, vests all legislative powers in the legislature and that the enacting clause of all bills shall be "The People of the State of California," &c.

Section 15 provides all laws shall be enacted by bill including but one subject that shall be fully stated in the title of the bill.

Section 25 provides, "No special laws shall be passed in any of the following cases, that is to say:

"Nineteenth. Granting to any corporation, association or individual any special or exclusive right, privilege or immunity."

It will be observed from the foregoing that no law can exist in the State of California emanating from any source, other than the legislature, and that this purported "*general law of the locality of Los Angeles*," is a judicial myth, and void on its face and excluded from this case by stipulation XXIII and XXVII (Tr., pp. 24-25).

Neither can it be supported on the theory that it is a legitimate construction of any statute. It would be an addition to the laws, an amendment not passed by the legislature.

Section 1858 of the C. C. P. of California, provides: "In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted."

Now, if counsel for the city could point out any law in the published statutes of California, which in terms or substance contained this "*law of the locality of Los Angeles*," it would be void in so far as it interfered with, called in question or impaired the legal title derived from the United States under the United States patent under which we hold.

By no subtle or insidious process of reasoning, or interpretation, or judicial legislation, however plausibly clothed or supported by argument of counsel, can a law, or the con-

struction of a law be found in the published statutes of the State of California, known as the *general law of the locality of Los Angeles.*

On page 82 of counsel's first brief for the city they say:

"In other words the city's water right existed under and by virtue of a general State policy, which was of continuing force and effect, and in no wise dependent upon any proceeding or adjudication under the act of March 3, 1851."

The *State policy* referred to by counsel is excluded from this case as not being in the published statutes of the State of California.

There can be no action by any State officer except pursuant to an act of the legislature directing such acts. The people of the State declare the policy of the State only by statute. It is not to be sought for in argument of counsel.

And if any such policy interfering with the primary disposal of this land by the United States, or impairing or calling in question this title derived from the United States existed, it would be void under the act admitting California as a State.

In case of *Miller & Lux Co. vs. Madera Canal & Irr. Co.* 155 Cal., on page 65, the court says:

"Neither a court nor the legislature has the right to say that because such waters may be more beneficially used by others, it may be freely taken by them. Public policy is at best but a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this State should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain."

The above quotation is also our reply to counsel's argument, on pages 27-8, as to the growing city of Los Angeles needing all the waters of the Los Angeles river, and confiscating the agricultural interests of the water shed of the river. The city has indeed grown as counsel suggests, but how much do not say. However, they could have said that the pueblo area of about 39 square miles had grown to 219 square miles by recent additions, with still additional areas seeking admission of vast areas of non-riparian arid land to take the waters from the agricultural farmers of the river's water-shed of about 800 square miles and reduce it to a desert, where they are enjoined from using said waters from the surface of the ground down to bed-rock, or any part thereof, from the sources of said river on the public lands, to the south boundary line of the city, as the same now is or may hereafter be expanded to.

What we claim in brief is this: Only the *legal* title is in issue. This *legal* title remained in the Mexican government subject to such executory claims as the pueblo may have had. The legal title passed to the United States by the treaty as successor of Mexico, the pueblo's imperfect rights or claims under the former government continued, but were not augmented by the treaty passing it the legal title. All these pueblo incipient rights were subject to the action of the United States in ascertaining and settling them. This the Government did, and fixed the limits of the pueblo rights at the date of the treaty at four square leagues and *rejected all other claims as invalid and void*. Thereafter the city's claim to all outside of the four square leagues was extinguished and left the title clear in the United States as against the city forever.

The proceedings stipulated in Tr., p. 22, XII and XIII, vested the legal title in this plaintiff in error.

The case is limited to the issues made on the complaint and answer. The issue is for *real property* and not for incorporeal, intangible, impalpable property, as argued by counsel. We ask that the case be decided on the stipulated facts

without the introduction of any further facts from any source.

The title of this plaintiff in error is under a patent issued under the laws of the United States as interpreted by this court. The owners of these titles look for their protection to the United States, with which they dealt, and whose laws are the supreme law of the land.

They considered their title, in whole and in part, immune from all State attacks, either by the legislature or by the State courts doing what the whole State power was prohibited from doing.

We ask this court to declare the full extent of the title we hold under our United States patent, laws, and decrees, and to declare whether it is immune against State attacks of every character, divesting us of our title or any part of it.

It is stipulated that this rancho and patent was before this court (Tr., p. 22, XIII) in case of *Thompson vs. Los Angeles Farming and Milling Co.*, 45 L. Ed., 432.

That was a case in which a vast horde of land-grabbers took forcible possession of a large area of patented land, setting up that the patent was void and trying to vary its effect as a conveyance.

This court decided the patent and title thereunder was immune.

The land-grabbers were defeated now the water-grabbers on 219 square miles of arid, non-riparian lands have seized all the waters in, on, and riparian to our lands from the surface of the ground down to bed rock, and perpetually enjoined us from using any part thereof. This water is the most valuable part of our land.

If our patent was good in this court for our land and the water in it in the former suit, why is it not equally good in this suit for that part and parcel of our land so known and designated in all courts, to wit, the waters therein from the surface of the ground to bed rock.

We respectfully submit our case to the court.

R. M. WIDNEY,
Counsel for Plaintiff in Error.

